

UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

\* \* \* \* \*

WISCONSIN RESOURCES PROTECTION  
COUNCIL, CENTER FOR BIOLOGICAL  
DIVERSITY and LAURA GAUGER,

Plaintiffs,  
-vs-

Case No. 11-CV-45-BBC

FLAMBEAU MINING COMPANY, INC., Madison, Wisconsin  
May 22, 2012  
Defendant. 9:03 a.m.

\* \* \* \* \*

STENOGRAPHIC TRANSCRIPT OF SECOND DAY OF COURT TRIAL  
MORNING SESSION  
HELD BEFORE DISTRICT JUDGE BARBARA B. CRABB,

APPEARANCES:

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1 Continued appearances:

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 3 BY: ATTORNEY MARC FINK  
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4 For the Defendant: DeWitt Ross & Stevens, S.C.  
 5 BY: ATTORNEYS HARRY VAN CAMP  
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7 Susan George - Paralegal

8 For the State Wisconsin Department of Justice  
 9 of Wisconsin: BY: AAG THOMAS J. DAWSON  
 17 West Main Street  
 10 Madison, Wisconsin 53703

11 Also present: Fred Fox

12 \* \* \* \* \*

13 **I-N-D-E-X**

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6 THE CLERK: Case Number 11-CV-45-BBC.

7 *Wisconsin Resource Protection Council, et al. v.*

8 *Flambeau Mining Company* is called for a second day of  
 9 court trial. May we have the appearances, please.

10 MS. MCGILLIVAY: Good morning, Your Honor.  
 11 Hard to remember that. Pam McGillivray, James Saul,  
 12 David Bender from McGillivray, Westerberg & Bender at  
 13 counsel's table; Kevin Cassidy from the Lewis & Clark  
 14 Law School. Also Christa Westerberg from McGillivray,  
 15 Westerberg & Bender, and Dan Mensher from Lewis & Clark  
 16 Law School. And Marc Fink from The Center of Biological  
 17 Diversity here for plaintiffs Wisconsin Protection  
 18 Resources Council, Center for Biological Diversity and  
 19 Laura Gauger.

20 THE COURT: Thank you.

21 MR. VAN CAMP: Have to drill myself to the seat  
 22 here. Harry Van Camp appearing on behalf of the  
 23 defendant Flambeau Mining Company. Also appearing on  
 24 behalf of the defendant Flambeau Mining Company is Scott  
 25 Paler; Mr. Fred Fox appearing on behalf of the company,

1 and we're assisted by Susan George.

2 THE COURT: Thank you.

3 MR. DAWSON: Assistant Attorney General Thomas  
4 Dawson representing Craig Roesler and any other  
5 Department of Natural Resources witnesses that may be  
6 called.

7 THE COURT: And Mr. Roesler can come back to  
8 the witness stand.

9 **CRAIG ROESLER, PLAINTIFFS' WITNESS, RESUMES STAND,**

10 THE COURT: Mr. Van Camp.

11 CONTINUED CROSS-EXAMINATION

12 BY MR. VAN CAMP:

13 Q Good morning, Mr. Roesler.

14 A Morning.

15 Q I have on the screen beside you Exhibit 1028, which  
16 is your Surface Water Quality Assessment, page 25 of  
17 that report, which is Table 1. You recognize that of  
18 course?

19 A Yes.

20 Q I believe as we concluded the testimony yesterday  
21 we were talking about the point that is indicated ED-14  
22 and we discussed the fact that there is, within the  
23 water that drains to that location, a ditch on the east  
24 side of Highway 27. Do you recall that testimony?

25 A Yes.

CRAIG ROESLER - CROSS

1 Q Now moving down to the south of that slightly  
2 curved yellow line below ED-14, there's a number MC 3-3.  
3 Do you see that?

4 A Yes.

5 Q And the area that -- the yellow area that MC 3-3 is  
6 in is also bounded on two sides by a road. On the west  
7 side is Highway 27; correct?

8 A Yes.

9 Q And on the south side is another road, Jenson Road.  
10 Do you recognize that?

11 A Yes.

12 Q Okay. And then below the MC 3-3, below the Jenson  
13 Road, the yellow line indicating Jenson Road, there's  
14 sort of a quarter circle area, and C 1-5, at least the  
15 square where C 1-5 is, is located in that and I  
16 understand that C 1-5 is pointing to something else.  
17 But that drainage area also includes a ditch along  
18 Highway 27; correct?

19 A Yes.

20 Q And also a ditch along the south side of Jenson  
21 Road; correct?

22 A Yes.

23 Q Okay. Then to the west of the area that we just  
24 discussed there is a sort of a U-shaped drainage area  
25 that has a EB-6 in it. Do you see that?

CRAIG ROESLER - CROSS

1 A Yes.

2 Q That would also include a drainage ditch along  
3 Highway 27 as part of that drainage; correct?

4 A Yes.

5 Q And that would be on the western side of that?

6 A Yes.

7 Q Then if we look at the sort of semi, I guess we'll  
8 call it triangular shape in which EB-6 rests and SEB-11  
9 -- do you see the yellow area that I'm referring to?

10 A I think so, yes.

11 Q It concludes at a point in the southwest corner  
12 where we have MB-16, FB-9, SC-7, FA-8. Do you see  
13 those?

14 A Yes.

15 Q Those -- that drainage area includes a drainage  
16 ditch on the south side of Copper Park Lane and a bit of  
17 a drainage ditch along Highway 27; correct?

18 A Yes, it does.

19 Q Then if we go above that, there is a small  
20 rectangular shape with a green dot in it that is pointed  
21 to by a rectangle that says CP-4. Do you see that small  
22 rectangular shape?

23 A Yes.

24 Q That small rectangular shape drains an area that  
25 includes a ditch along Highway 27 for a short distance;

CRAIG ROESLER - CROSS

1 correct?

2 A Yes.

3 Q And it also drains an area with a ditch along the  
4 north side of Copper Park Lane; correct?

5 A Yes.

6 Q And then there is a small circular area. And above  
7 that and to the right of that are ditches along Highway  
8 27 and on the south side of Copper Park Lane; correct?

9 A I'm not sure what small circular area you're  
10 referring to.

11 Q Okay. There's a point on it that is indicated in a  
12 white rectangle SEB-11. It's not really a circle, it's  
13 sort of a tear-dropped shape.

14 A Yes.

15 Q Do you see that?

16 A Yes.

17 Q And above that, the yellow line, the sort of  
18 straight yellow line is Copper Park Lane; correct?

19 A Yes.

20 Q And there would be a drainage ditch on the south  
21 side of Copper Park Lane?

22 A Yes.

23 Q And then to the right or to the east of that  
24 tear-dropped shape there is a drainage ditch along  
25 Highway 27 that would drain into that area as well.

CRAIG ROESLER - CROSS

1 A Drain into what area?

2 Q Well, the area that's sort of around that  
3 tear-dropped shape.

4 A Yes.

5 Q Now, you know that, in fact, highways and parking  
6 lots can be sources for runoff of copper; correct?

7 A Yes.

8 Q In fact, in the preparation of your Surface Water  
9 Quality Assessment, one of the individuals that you  
10 identified as a contributor was a fellow by the name of  
11 Roger Bannerman; correct?

12 A Yes.

13 Q Who is Roger Bannerman?

14 A He's a DNR employee in Madison that's done a lot of  
15 work looking at water quality of urban runoff  
16 especially.

17 Q Okay. Now I'm going to show you a document that's  
18 on your screen that has been marked as Defendant's  
19 Exhibit 579. Do you see that?

20 A Yes.

21 Q And it's an email back and forth between you and  
22 Mr. Bannerman; correct?

23 A Yes.

24 Q And the earliest email is the lower one, which is  
25 an email from you to Mr. Bannerman. Would you read to

CRAIG ROESLER - CROSS

1 the Court what you asked in that email?

2 A "I'm looking at some runoff data for copper and  
3 zinc concentrations at the reclaimed Flambeau Mine site  
4 near Ladysmith. Some sample sites are influenced by  
5 highway or parking lot runoff. Does runoff from these  
6 surfaces typically contain copper and zinc at chronic or  
7 acute toxicity concentrations?"

8 Q And then the email above that is the response you  
9 received from Mr. Bannerman; correct?

10 A Yes.

11 Q Would you read what he said to the Court.

12 MR. SAUL: Objection. Hearsay.

13 THE COURT: Sustained.

14 BY MR. VAN CAMP:

15 Q Was the email that you received information that  
16 was obtained by you for use in your Surface Water  
17 Quality Assessment?

18 A This email? Yes.

19 Q And you included that information in your  
20 assessment; correct?

21 A Yes.

22 Q Ask you to read what Mr. Bannerman told you.

23 A It says, "Hi Craig. Yes, the levels of total  
24 recoverable zinc and copper in highway and parking lot  
25 runoff can exceed the chronic and acute toxicity

CRAIG ROESLER - CROSS

1 criteria. See page 19 and 252 of attached reports. The  
2 more busy the highway or parking lot, the higher the  
3 levels. The highways are a much more important source  
4 than the parking lots. I hope this helps. Take care.  
5 Roger B."

6 MR. VAN CAMP: Move for admission of 579.

7 THE COURT: Any objection?

8 MR. SAUL: No objection.

9 THE COURT: Received.

10 MR. VAN CAMP: I have no further questions for  
11 this witness. Thank you very much.

12 THE COURT: Mr. Saul, anything further?

13 MR. SAUL: No questions, Your Honor.

14 THE COURT: You may step down. If I were you,  
15 I would get out of here fast.

16 (Witness excused at 9:14 a.m.)

17 THE COURT: Is Mr. Roesler free to leave?

18 MS. MCGILLIVAY: Yes, he is, Your Honor.

19 THE WITNESS: Permanently?

20 MR. VAN CAMP: Forever.

21 MR. CASSIDY: Your Honor, the plaintiffs next  
22 witness is Jana Murphy. We could call her to the stand.  
23 And if it's okay with Your Honor, I'm going to be using  
24 the monitor and the ELMO, and so I think it would be  
25 more efficient if I wasn't reaching over if I could

CRAIG ROESLER - CROSS

1 examine the witness from the podium.

2 THE COURT: Absolutely.

3 **JANA MURPHY, PLAINTIFFS' WITNESS, SWORN,**

4 MR. CASSIDY: Thank you. Good morning, Your  
5 Honor. As a preliminary matter for the record, the  
6 plaintiffs are calling Ms. Murphy in our case-in-chief  
7 as an adverse witness. She is -- expected testimony  
8 will be that she is a -- has been an employee of  
9 Flambeau Mining Company for 20 years; still an employee  
10 there; has -- expects to continue to be an employee  
11 there.

12 THE COURT: Is there any objection to that,  
13 Mr. Van Camp?

14 MR. VAN CAMP: No.

15 MR. CASSIDY: Thank you, Your Honor. And I  
16 assume -- well, I should ask. Under 611, may I lead the  
17 witness as an adverse witness?

18 THE COURT: You may.

19 MR. CASSIDY: Thank you.

20 ADVERSE EXAMINATION

21 BY MR. CASSIDY:

22 Q We haven't met. I should introduce myself. Good  
23 morning, Ms. Murphy. My name is Kevin Cassidy. I'm an  
24 attorney for the plaintiffs in this case. Where do you  
25 work?

JANA MURPHY - ADVERSE

1 A I work in Ladysmith, Wisconsin on the reclaim mine  
2 site.

3 Q And what reclaim mine site are you speaking of?

4 A It's the Flambeau Mining Company's reclaim mine  
5 site.

6 Q What's your title?

7 A Environmental and Reclamation Manager.

8 Q How long have you worked in that capacity for the  
9 Flambeau Mining Company?

10 A I've worked for the Flambeau Mining Company going  
11 on 20 years, and I would say since about 1998 I've been  
12 the Environmental and Reclamation Manager.

13 Q And before that what was your job title?

14 A Title was Environmental Supervisor.

15 Q So your job has always involved environmental  
16 matters at the job site?

17 A Yes.

18 Q Are there any other Flambeau Mine employees in  
19 Wisconsin other than you?

20 A No.

21 Q And how long have you been the only Flambeau Mine  
22 employee in Wisconsin?

23 A Oh, I would say approximately ten years.

24 Q I'm going to ask you a few questions about your  
25 education and background. Do you have any -- do you

JANA MURPHY - ADVERSE

1 hold any college degrees?

2 A I have a bachelor's in biology.

3 Q From what university?

4 A It's from Mt. Senario College.

5 Q And what year did you receive that degree?

6 A 1986.

7 Q And do you have another degree?

8 A I have a master's in environmental and public  
9 health.

10 Q And from what university?

11 A University of Wisconsin-Eau Claire.

12 Q And what year did you receive that degree?

13 A '93. 1993.

14 Q Did you do a master's thesis?

15 A No.

16 Q As the environmental supervisor -- so I'm going to  
17 go back before you became the Environmental and  
18 Reclamation Manager. As an environmental supervisor,  
19 when you were first hired, what were your duties?

20 A My duties were to observe the remaining  
21 construction, work with -- during a transition period to  
22 come up to speed with the permits, and continue the  
23 environmental management implementing systems permit  
24 compliance reporting.

25 THE COURT: So can I get this straight, when  
JANA MURPHY - ADVERSE

1 you were fired hired, what was the state of the mine at  
2 that point?

3 THE WITNESS: It was under construction.

4 THE COURT: So you were there from '94/'95?

5 THE WITNESS: '92.

6 THE COURT: '92?

7 BY MR. CASSIDY:

8 Q And when you say *under construction*, what does that  
9 mean?

10 A That means it hadn't begun mining yet.

11 Q Now when did it begin mining?

12 A Mining phase began in 1993.

13 Q And how long did that last?

14 A That lasted until summer of '97.

15 Q So during all of that you were the environmental  
16 supervisor there?

17 A Yes.

18 Q And what were your day-to-day jobs during that  
19 time?

20 A During that time I would collect or oversee the  
21 collection of samples; coordinate work on reports with  
22 the consultants; reviewing reports and reporting legal  
23 requirements for the DNR; attend meetings; discussing  
24 any action that needed to be taken on the site.

25 Q So you mentioned sample collection and sample  
JANA MURPHY - ADVERSE

1 monitoring. What type of samples were you working with?

2 A We had the Flambeau River and groundwater and air  
3 monitoring.

4 Q So surface water samples?

5 A Yes.

6 Q Groundwater samples?

7 A Yes.

8 Q Air samples?

9 A Yes.

10 Q Any other kind of samples?

11 A Biota was collected from the river by consultants.

12 Q What do you mean by *biota*?

13 A Crayfish; fish; macroinvertebrates were identified,  
14 collected and identified.

15 Q Okay. And then how did your job duties change when  
16 you became the Environmental Reclamation Manager?

17 A Increased responsibility due to the reduction in  
18 the number of managers on the site. Also we had moved  
19 past the mining phase and into the reclamation phase and  
20 closure.

21 Q And so what did that mean for you? What -- you  
22 said increased responsibility. Were you doing other  
23 tasks or were you just supervising more?

24 A I would say that it involved more time with the  
25 community relations, public relations, and as far as a

JANA MURPHY - ADVERSE

1 change in the type of management of consultants to  
2 ecological consultants, more than construction and  
3 mining.

4 Q Did the duties you had with regard to water  
5 sampling and monitoring and analysis continue as you  
6 were the Environmental Reclamation Manager?

7 A Yes.

8 Q And do they continue up until today?

9 A Yes.

10 Q Okay. So essentially you've been collecting  
11 environmental monitoring data at the mine since 1992?

12 A Or overseeing someone who did it.

13 Q Okay. Have you collected samples at something  
14 called the *biofilter*?

15 A Yes.

16 Q And just so I know, there may be more than one  
17 biofilter on the site; is that right?

18 A Yes. At one time it referred to one other  
19 biofilter.

20 Q Just so we are talking about the same biofilter,  
21 I'm going to put an exhibit on your screen. This is  
22 Exhibit JE 1024. Do you see that number?

23 A Um-hmm, yes.

24 Q And in this picture do you see a biofilter that's  
25 marked .9 acre biofilter basin?

JANA MURPHY - ADVERSE

1 A I see the approximate east half of it.

2 Q Okay. So as we go forward today, that's the  
3 biofilter I'm going to be asking you questions about,  
4 okay?

5 A Yes.

6 Q And so the question was have you collected samples  
7 at this biofilter?

8 A Yes.

9 Q And what is the biofilter?

10 A The biofilter is a structure that was put in place  
11 as part of the stormwater management system for the  
12 Industrial Outlot.

13 Q What does it do?

14 A It holds water and allows particulates to settle  
15 out.

16 Q And when you say *particulates*, what do you mean?

17 A It could be whatever is coming in that's suspended.  
18 It could be runoff from the parking lot. It could be  
19 runoff from roofs. It could be just runoff from the  
20 site and whatever solids that were carried with it.

21 Q So stormwater is designed from the site, at least  
22 for part of the site, to empty into this biofilter?

23 A Yes.

24 Q And then the biofilter has a -- is a settling  
25 process, for lack of a technical term, a settling

JANA MURPHY - ADVERSE

1 process by which particulates settle out; is that  
2 correct?

3 A Yes.

4 Q And the particulates could be metals?

5 A Yes.

6 Q Could be copper?

7 A Yes.

8 Q Zinc?

9 A Yes.

10 Q Other metals?

11 A Yes.

12 Q Could particulates be other things?

13 A Yes.

14 Q Okay. But that's how the biofilter was designed to  
15 work; is that right?

16 A In part, yes. The primary design, yes.

17 Q Okay. And you said you've been able to take --  
18 you've taken samples from the biofilter itself?

19 A Yes.

20 Q And have you taken samples from the biofilter  
21 outlet?

22 A Yes.

23 Q And just so we make sure we're talking about the  
24 same thing, if I -- I'm going to circle what I

25 understand to be the biofilter outlet on this and you

JANA MURPHY - ADVERSE

1 can tell me if I've got it right, okay? (Indicating)

2 A Yes.

3 Q Is it generally in that area where I circled which  
4 is the northeastern corner of the biofilter that we see  
5 in this picture?

6 A Yes.

7 Q Have you ever seen water discharging through that  
8 biofilter outlet?

9 A I've seen water flowing in an easterly direction.

10 Q Okay. So you've seen water discharging through the  
11 biofilter outlet?

12 A I assume. Most times the grass is so thick that I  
13 can't see where it goes beyond the rock area.

14 Q Well, I'm not -- I'm actually not asking you where  
15 it goes yet. I'm just asking you if you saw a discharge  
16 out of the outlet.

17 A I have a hard time telling where the actual edge of  
18 the outlet is because of the naturalization, so...

19 Q Well, when you say *naturalization*, you mean growth?

20 A Yes.

21 Q Okay. But part of your job was to take samples at  
22 that location.

23 A Right.

24 Q Okay.

25 A Yes.

JANA MURPHY - ADVERSE

1 Q And you have -- we're going to look at some  
2 sampling data later that says *BO*, you know, and a  
3 certain number -- certain numbers, and those numbers,  
4 they're indicative of a sample point at that location.

5 A Yes.

6 Q So when you went to take a sample point there, you  
7 knew where the biofilter outlet was.

8 A Yes.

9 Q And when you were there, you were taking samples of  
10 water.

11 A Yes.

12 Q Of runoff.

13 A Yes.

14 Q So the question is have you seen water discharging  
15 out of the biofilter outlet?

16 A Yeah. I have seen water flowing east and out of  
17 the biofilter outlet.

18 Q Okay. You mentioned flowing east. And is that the  
19 direction that the arrow coming out of the biofilter  
20 outlet that I just circled, again that you just  
21 identified as the outlet, is that the direction that  
22 arrow is pointing?

23 THE COURT: How can you tell?

24 THE WITNESS: I have a hard time seeing it. It  
25 blends in.

JANA MURPHY - ADVERSE

1 MR. CASSIDY: May I approach the witness, Your  
2 Honor?

3 THE COURT: Certainly.

4 THE WITNESS: I can see it now, yes.

5 BY MR. CASSIDY:

6 Q Okay. So that is the direction you're referring  
7 to, the water flowed east?

8 A Generally, yes.

9 Q In the same direction as this arrow.

10 A Generally.

11 Q Okay. Now where -- did you ever see the water come  
12 out of the biofilter and flow north?

13 A I didn't look that closely.

14 Q So you didn't. Did you ever see it flow north?

15 A No.

16 Q Did you ever see it flow back into the biofilter,  
17 flow west?

18 A No.

19 Q Okay. And at the outlet, right at the outlet where  
20 you were taking samples, did you ever see it flow  
21 directly south?

22 A No.

23 Q Okay. So all the observations you had were it was  
24 flowing east out of the outlet?

25 A Yes.

JANA MURPHY - ADVERSE

1 Q Where does the water flowing out of the biofilter  
2 go?

3 A It goes into -- actually it depends upon the amount  
4 of flow, which isn't quantified. I know it has the  
5 possibility of going into the adjacent wetland.

6 Q So if I asked you where the water flowing out of  
7 the biofilter goes, and assuming there's enough flow,  
8 okay? Let's put aside trickles for a second. Assuming  
9 there's enough flow coming out of the biofilter that you  
10 see it discharging, what is your understanding of where  
11 it goes?

12 A Generally it flows to the east towards the wetland.

13 Q Okay. I'm going to have you take a look at an  
14 exhibit; put it on your screen. Can you see Exhibit JE  
15 1008?

16 A Yes.

17 Q And do you see your name at the top of that  
18 exhibit?

19 A Yes.

20 Q And is this, and I'll turn -- this is a multi-page  
21 exhibit, so I'm going to show you the second page and  
22 then the third page. And do you see -- do you generally  
23 recognize this as an email exchange?

24 A Yes.

25 Q And it's between you and somebody named Dale Lueck,  
JANA MURPHY - ADVERSE

1 if I'm pronouncing his name; correct?

2 A Yes. I don't remember what the first page showed,  
3 so...

4 Q I'm just asking if you generally recognize this as  
5 an email exchange between you and Dale Lueck.

6 A I see Dale Lueck down at that location and I didn't  
7 get a chance to see -- I'm assuming down on the first  
8 page it's Dale Lueck as well?

9 Q We'll go back to that. Here is the third page. So  
10 this is generally, you understand email exchanges, when  
11 you print them out, to start at the bottom and move  
12 their way up?

13 A Yes.

14 Q Okay.

15 MR. CASSIDY: Your Honor, we move 1008 into  
16 evidence.

17 MR. VAN CAMP: I don't believe there's a proper  
18 foundation for it.

19 THE COURT: Not yet.

20 BY MR. CASSIDY:

21 Q Did you -- do you send emails during the course of  
22 your business?

23 A Yes.

24 Q And was this email sent while you were an employee  
25 of the Flambeau Mine Company?

JANA MURPHY - ADVERSE

1 A I haven't had a chance to review it.

2 THE COURT: Why don't you show her the  
3 original. Not the original...

4 MR. CASSIDY: May I approach?

5 THE COURT: Show her the paper copy.

6 MR. CASSIDY: Thank you, Your Honor.

7 Q You can hold on to that and look at it. So we'll  
8 start at the first page at the top. Says *Jana Murphy*,  
9 *Flambeau Mining Company*. So this is a work email for  
10 you; is that right?

11 A Yes.

12 Q And it has the email that you used to -- for your  
13 work purposes?

14 A Yes.

15 Q So this would have been done during the course of  
16 your employment at Flambeau Mine Company?

17 A Yes.

18 Q And the subject matter of this email, if you've had  
19 a chance to look at it, there are certain questions  
20 about the biofilter, Stream C, and the Flambeau River.  
21 Those are all within the purview of your environmental  
22 duties at Flambeau Mine Company; correct?

23 A Yes.

24 MR. CASSIDY: Your Honor, we'd move this in as  
25 a not hearsay admission. 801-D2.

JANA MURPHY - ADVERSE

1 MR. VAN CAMP: No objection.

2 THE COURT: Received.

3 MR. CASSIDY: Thank you.

4 BY MR. CASSIDY:

5 Q So, the question I asked you earlier was where does  
6 water flowing from the biofilter go.

7 A Yes.

8 Q And you were asked that same question during the  
9 course of this email exchange or the question was asked  
10 of you; is that right?

11 A Yes.

12 Q Okay. And do you remember who Dale Lueck is?

13 A I believe he's from Minnesota.

14 Q And do you remember why Mr. Lueck was asking you  
15 this question?

16 A It may be related to Kennecott exploration work  
17 over there.

18 Q And did you endeavor to answer his questions in  
19 this email?

20 A Yes.

21 Q And if we -- I'm going to direct your attention to  
22 the first page. If we go down to here, I'm circling on  
23 the screen the same question I just asked you: "Where  
24 does the water flowing out of the biofilter go?" Do you  
25 see that?

JANA MURPHY - ADVERSE

1 A Yes.

2 Q And what was your answer on October 5th, 2006?

3 A And you want me to read it?

4 Q Please.

5 A "Water flowing out of the biofilter flows into a  
6 small intermittent stream designated Stream C. Flambeau  
7 has conducted biological assessments of Stream C during  
8 both the spring and fall. Due to its intermittent  
9 nature of the stream, it has poor aquatic habitat and is  
10 very limited in biota in all aspects, including aquatic  
11 vegetation, macroinvertebrates and fish populations."

12 Q Thank you. Now, so 2006 when you were asked that  
13 question, you didn't say it flowed to a wetland, you  
14 answered the question, "Water flowing out of the  
15 biofilter flows into a small intermittent stream  
16 designated Stream C."

17 A That's right, yes.

18 Q And if we go back to 1024, that diagram we just  
19 looked at, do you see a blue line on there that is east  
20 of the biofilter outlet that has been labeled or that  
21 has been called *Intermittent Stream C*?

22 A I see the blue line, yes.

23 Q And you understand that's been referred to by  
24 Flambeau Mine Company, by yourself, and by Flambeau's  
25 consultants as Intermittent Stream C; right?

JANA MURPHY - ADVERSE

1 A That general area, yes.

2 Q Okay. And so when you said water flowing out of  
3 the biofilter flows into a small intermittent stream  
4 designated Stream C, that's what you were referring to;  
5 correct?

6 A I was referring to that area.

7 Q You were referring to the area where the blue line  
8 comes down just east of the biofilter; correct?

9 A I never considered that Stream C. We refer to it  
10 because of the watershed and the flow pattern, but --  
11 potential flow pattern.

12 Q Okay. Well, if you referred to it as Stream C  
13 because of the watershed, what do you mean by that?

14 A That's a land area that has the potential to runoff  
15 that would reach Stream C.

16 Q So you referred to this area as Intermittent Stream  
17 C why?

18 A Because it's part of the watershed of Stream C.

19 Q Okay. And which would -- so it would flow  
20 downstream into what? Into Stream C below Copper Park  
21 Lane; is that correct?

22 A Yes. It flows down through the wetland and to  
23 Copper Park, the stream under Copper Park Lane.

24 Q Okay. And that would be south, flowing south;  
25 right?

JANA MURPHY - ADVERSE

1 A Yes, if there's sufficient water.

2 Q I'm going to put the Exhibit 1008 back on the  
3 screen for you.

4 THE COURT: Ms. Murphy -- oh, somebody already  
5 did.

6 MR. CASSIDY: I did it, Your Honor. I cleared  
7 it.

8 THE COURT: Thank you.

9 BY MR. CASSIDY:

10 Q Now I want to look at Question 3. That's the next  
11 question down. Another question that was posed to you  
12 in this email exchange on October 5, 2006. And the  
13 question reads: "What are the concentrations of copper  
14 in water flowing from the biofilter to Stream C?" And  
15 if you could just read the first sentence of that  
16 response for us.

17 A "Copper concentrations in Stream C upstream of the  
18 biofilter (background concentrations) have been  
19 naturally higher than what is measured in the water  
20 flowing out of the biofilter into Stream C."

21 Q So in that sentence you refer to something called  
22 *Stream C upstream of the biofilter*. What are we talking  
23 about there?

24 A We're talking about again the watershed that's  
25 upgradient that would be -- we have a sampling point

JANA MURPHY - ADVERSE

1 along Highway 27.

2 Q And you call that Stream C in this response.

3 A It's part of the Stream C watershed.

4 Q Just so I know what part of the Stream C watershed  
5 it is, I put Exhibit 1024 back up on the monitor and if  
6 the -- I'll circle the biofilter outlet. Do you see my  
7 circle there at the top northeast corner of the  
8 biofilter?

9 A Yes.

10 Q And so when you're referring to Stream C upstream  
11 of the biofilter, are you referring to this blue line  
12 that runs, on this photograph, to the -- well, let's  
13 make it the way the water flows, okay? Just so we're  
14 clear. Upstream means the water would be flowing down  
15 towards the biofilter; correct?

16 A Right, if there's sufficient water.

17 Q Okay. Let's just -- let's just assume there's  
18 sufficient water for the questions, but I understand  
19 your qualification. But if the water is flowing in the  
20 stream and it's flowing from upstream, it would be  
21 coming from the eastern part of this photograph, flowing  
22 along generally where the blue line is and then flowing  
23 through what are referred to as railroad culverts and  
24 then again intersecting down near the outlet of the  
25 biofilter. Is that your understanding?

JANA MURPHY - ADVERSE

1 MR. VAN CAMP: Object to the form of the  
2 question.

3 Q Is that your understanding?

4 MR. VAN CAMP: There's a discussion about an  
5 intersecting. It's a compound question, and --

6 THE COURT: Why don't you -- if that's your  
7 objection, break it down into smaller bites.

8 MR. CASSIDY: I will, Your Honor. Okay.

9 BY MR. CASSIDY:

10 Q Just to -- we're talking about your answer to  
11 Question 3 where you say "copper concentrations in  
12 Stream C upstream of the biofilter." And what I'm  
13 trying to get an understanding of is what you define as  
14 upstream of the biofilter.

15 So maybe the best way to do this is to go ahead and  
16 have you mark it. I'm going to -- you can mark it on  
17 your screen if you push hard enough. Why don't you  
18 circle biofilter outlet.

19 A (Witness complies)

20 Q Okay. You've circled that in blue. Thank you.  
21 And then please tell me what you were referring to when  
22 you were talking about copper concentrations in Stream C  
23 upstream of the biofilter on this photograph.

24 A It's actually north of this point. That isn't an  
25 accurate representation that I have there. It would be

JANA MURPHY - ADVERSE

1 more like the point is up higher. It's a sample point  
2 along the highway ditch.

3 Q Okay. So those concentrations of copper are  
4 actually off this picture further up the watershed; is  
5 that right?

6 A Yes.

7 Q Okay. And when you say they are -- they are  
8 naturally higher than what was measured in water flowing  
9 out of the biofilter into Stream C, where -- how do  
10 those two things connect?

11 A The elevation differences show there's a potential  
12 for water to flow generally from north to south and in  
13 an easterly direction.

14 Q Okay. Can you go ahead and show us how they  
15 connect with marking the map, please.

16 A I have -- I have seen -- I have not -- it's -- I  
17 have not seen flows in certain areas, so I can only  
18 speak to that which I have actually seen.

19 Q That's fine.

20 A So I have seen flow at this location (indicating),  
21 and in that spot it appeared to be going west.

22 THE COURT: When you say *this location*, you're  
23 talking about the northeast corner essentially of the  
24 photograph?

25 THE WITNESS: Yeah.  
JANA MURPHY - ADVERSE

1 THE COURT: Near Highway 27.

2 THE WITNESS: It's the outlet of the highway  
3 culvert on the west side of the highway. I've --

4 BY MR. CASSIDY:

5 Q I'm sorry. Go ahead.

6 A I've also observed flow at these culverts going  
7 into the culverts.

8 Q Okay. And --

9 THE COURT: For the record, you've drawn a line  
10 essentially straight west from the first dot that you  
11 put in?

12 THE WITNESS: Yes.

13 MR. CASSIDY: So, Your Honor, just -- I do want  
14 to clarify.

15 Q Have you -- you've drawn two dots, and the flow, as  
16 you understand it, would go between those two dots?

17 A I would assume so.

18 Q Okay. And then where would the flow go after the  
19 second dot you drew at the eastern side of the railroad  
20 culverts?

21 A It would exit the culverts.

22 Q Okay. Can you draw a dot where it would exit the  
23 culverts?

24 A (Witness complies)

25 Q And from there, where would the flow --  
JANA MURPHY - ADVERSE

1 THE COURT: Would you describe for the record  
2 where she has indicated that --

3 MR. CASSIDY: I'm sorry, Your Honor.

4 Q So Ms. Murphy, you drew a dot -- you drew your  
5 third dot there at the western side of what you  
6 identified as the railroad culverts, which are  
7 delineated as two light blue solid lines on this map; is  
8 that right?

9 A Yes.

10 Q Now from the exit of the railroad culverts, where  
11 would the water flow then?

12 A What I've observed is at a vantage point and I  
13 would see flow from the culverts in this general kind of  
14 fan. (Indicating) And I have also stood in the area of  
15 the farmer's culvert, and looking to the north, seen a  
16 sheetflow across the wetland going south.

17 Q Okay. So you've drawn a couple more dots here, so  
18 I want to -- for the record, you drew some dots below  
19 your third dot underneath the railroad culvert where you  
20 said you saw the water come out of there and flow. And  
21 it's flowing south; right?

22 A Yes.

23 Q And then you saw -- you drew another dot at the  
24 very southern end of this photograph where what you call  
25 was the farmer's culvert; is that right?

JANA MURPHY - ADVERSE

1 A Yes.

2 Q And that dot is now -- or at the very southern part  
3 of the biofilter; correct?

4 A Outside the biofilter.

5 Q To the east.

6 A To the east.

7 Q Thank you. And so the flow has now come down from  
8 Highway 27 through the railroad culverts, exited the  
9 railroad culverts, passed by the biofilter outlet, and  
10 arrived down at the farmer's culvert at the very bottom  
11 of this picture; is that correct?

12 MR. VAN CAMP: Object to the form of the  
13 question. Mischaracterizes the testimony.

14 MR. CASSIDY: Do you agree with that, with the  
15 summary I just gave?

16 MR. VAN CAMP: I'll object.

17 THE COURT: Overruled.

18 THE WITNESS: It isn't in a single day that I  
19 would have visited all of those spots.

20 BY MR. CASSIDY:

21 Q I understand that. That's not the question. The  
22 question was the dots you drew on this map represent  
23 your understanding of the direction of the flow of the  
24 water.

25 MR. VAN CAMP: Object to the form of the  
JANA MURPHY - ADVERSE

1 question.

2 THE COURT: Overruled.

3 THE WITNESS: Based upon elevation differences,  
4 yes, but I haven't observed that.

5 THE COURT: Why don't you take a photograph of  
6 that.

7 MR. CASSIDY: I intended to do that, Your  
8 Honor. Thank you. Can we do that? Actually, no, I  
9 cannot zoom out. So I do want to continue it down the  
10 stream there.

11 THE COURT: That's fine.

12 BY MR. CASSIDY:

13 Q Would you also -- while the printer is warming up,  
14 would you also agree with me, Ms. Murphy, that between  
15 the dots that you just drew there is generally a blue  
16 line that connects them all except for where the  
17 railroad culverts are?

18 A Yes.

19 Q So that blue line --

20 MR. CASSIDY: Do you have a sticker? Your  
21 Honor, we move Exhibit 88, the printed-out exhibit into  
22 evidence.

23 THE COURT: Any objection?

24 MR. VAN CAMP: No objection.

25 THE COURT: Received.  
JANA MURPHY - ADVERSE

1 BY MR. CASSIDY:

2 Q So that blue line that's depicted in between your  
3 blue dots is generally your understanding of the  
4 direction of the water flow in this picture?

5 A Potential flow, yes.

6 Q And in fact, you've seen it flowing at certain  
7 areas along there on certain times?

8 A Yes.

9 Q Okay. So it's more than just potential, you've  
10 actually seen it flowing.

11 A Yes. At those locations, yes.

12 Q I'm going to just slide the picture up slightly and  
13 if -- just so you can reorient us since I've moved the  
14 picture, this is the same Exhibit 1024. Can you again  
15 mark on there the biofilter outlet?

16 A (Witness complies)

17 Q And can you draw a dot at the northern end of the  
18 stub road culvert, which is what you drew on your last  
19 picture in Exhibit 88?

20 A (Witness complies)

21 Q So now if you can tell us where the water goes next  
22 from your dot at the stub road culvert?

23 A The water would go to the south.

24 Q And that's in the direction of the blue arrow  
25 that's pointing?

JANA MURPHY - ADVERSE

1 A Yes.

2 Q And have you observed that?

3 A I've observed a portion of that from Copper Park  
4 Lane and the southern more part of the blue line.

5 Q Have you -- have you ever been out on the stub  
6 road?

7 A Yes.

8 Q And have you observed flow there?

9 A I observed flow coming into the culvert. I have  
10 memory of that.

11 Q Okay.

12 A And I didn't observe what was coming out, so --

13 Q So how wide is the stub road?

14 A Twenty-five feet.

15 Q So when you were out there on the day you remember  
16 it, you remember seeing water coming --

17 A Yeah.

18 Q -- into the culvert, but did you look to see if it  
19 was coming out?

20 A Not at that location.

21 Q Did you assume where it was going?

22 A Yes.

23 Q On the other side of the culvert?

24 A It was going through -- yeah, I assumed it was  
25 going through the culvert.

JANA MURPHY - ADVERSE

1 Q And you put another small dot there about -- on the  
2 north end of the stub road culvert where you said you  
3 observed flow, and so then when -- and then you put a  
4 blue dot or mark down on Copper Park Lane where you said  
5 you've observed flow; is that correct?

6 A I have been on Copper Park Lane looking to the  
7 north and I've seen flow in the -- north of Copper Park  
8 Lane, but in the lower south part of the blue line.

9 Q And that flow would be coming toward you; right?

10 A It would be flowing south towards the culvert under  
11 Copper Park Lane.

12 Q And then once it gets to the culvert under Copper  
13 Park Lane, where does it go?

14 A It exits the culvert and enters a riprap channel  
15 and carries on into the woodland and Stream C.

16 Q The riprap channel is Stream C?

17 A Yes.

18 Q Now -- and again, just to go full circle on this,  
19 if you go from the biofilter outlet down to the dots  
20 that you've drawn on this figure at the stub road  
21 culvert, at Copper Park Lane, and south of Copper Park  
22 Lane, except where there are culverts indicated, there  
23 is generally a blue line; is that right?

24 A I see the blue line, yes.

25 Q And is that the general -- that goes in between  
JANA MURPHY - ADVERSE

1 your dots; correct?

2 A Yes.

3 Q And in fact, if you were -- if you were asked --  
4 can you put -- if you were asked to connect your dots  
5 from the biofilter outlet down to south of Copper Park  
6 Lane, it would be generally along that blue line?

7 MR. VAN CAMP: Objection. Relevance.

8 THE COURT: Sustained.

9 BY MR. CASSIDY:

10 Q Can you connect your dots on this picture?

11 MR. VAN CAMP: Objection. Relevance.

12 THE COURT: Sustained.

13 MR. CASSIDY: Is the -- actually we'll mark  
14 this. Can we print this?

15 BY MR. CASSIDY:

16 Q So this line of questioning, Ms. Murphy, started  
17 back with Exhibit 1008. I'm going to show you that  
18 again. I think you have that in front of you. So we're  
19 looking back at Exhibit 1008 and now I'm going to take  
20 you down to Question 4. Do you see Question 4?

21 A I see Question 4.

22 Q And that question asks you: "At the time in 2006  
23 is the biofilter polluting Stream C and the Flambeau  
24 River? And can you read your answer to that question.

25 A The short answer is "No. The data shows  
JANA MURPHY - ADVERSE

1 conclusively that the concentration of copper in the  
2 water coming out of the biofilter is equivalent or  
3 better than background conditions. Thus it is concluded  
4 that the biofilter is doing its job and not polluting  
5 the Flambeau River or Stream C."

6 Q So when you said *conclude the biofilter is doing*  
7 *its job*, what did you mean by that?

8 A Reducing any potential or potential contaminates  
9 that come into the biofilter.

10 Q And exit the biofilter?

11 A Yes.

12 Q Okay. So if the biofilter wasn't doing its job  
13 correctly, would there be an opportunity for more  
14 pollutants to exit the biofilter?

15 A I don't know.

16 Q Is that -- so when the biofilter was designed, you  
17 were there; correct?

18 A Yes.

19 Q And so you were there when it was built and  
20 constructed?

21 A Yes, I was there.

22 Q And essentially you testified already, but the  
23 biofilter was designed to filter out pollutants.

24 A Yes.

25 Q And to keep those pollutants from reaching where?

JANA MURPHY - ADVERSE

1 A As part of the best management practices, the  
2 runoff from the Industrial Outlot was routed through  
3 that location to settle out particulates so that they  
4 wouldn't exit the biofilter.

5 Q And so -- and you were concerned about them exiting  
6 the biofilter and going where?

7 A Into the adjacent environment.

8 Q And what was the adjacent environment?

9 A Stream C watershed.

10 Q Okay. And just -- I want to show you a quick  
11 exhibit. It's a big one, so I'm going to hand you a  
12 hard copy.

13 MR. CASSIDY: May I approach, Your Honor?

14 THE COURT: You may.

15 BY MR. CASSIDY:

16 Q I'm going to ask you to look at 1010. Do you  
17 recognize that document, Ms. Murphy?

18 A Yes.

19 Q And how do you recognize it?

20 A I recognize it because it was a supplement to the  
21 Surface Reclamation Plan which include refinements and  
22 details of the Reclamation Plan for the Flambeau Mining  
23 Company.

24 Q Okay. And it's dated December 1997?

25 A Yes.

JANA MURPHY - ADVERSE

1 Q And you have already testified that you were the  
2 Environmental Reclamation Manager at the site?

3 A Yes.

4 Q So this involves reclamation and environmental  
5 matters, this document?

6 A Yes.

7 Q And this would have been a document that was  
8 produced by the Flambeau Mining Company or one of its  
9 consultants?

10 A Yes.

11 Q And in fact, it does indicate that it was prepared  
12 by Applied Ecological Services for the Flambeau Mining  
13 Company, if you look at the back of the cover page.

14 A Yes.

15 MR. CASSIDY: Your Honor, we'd move Joint  
16 Exhibit 1010.

17 THE COURT: Any objection?

18 MR. VAN CAMP: No, Your Honor.

19 THE COURT: Received.

20 MR. CASSIDY: Thank you, Your Honor.

21 BY MR. CASSIDY:

22 Q If we could first turn to page five, and to try to  
23 make it easy, I'll circle on the page on the screen  
24 where I'll ask you to take a look. So circled in red,  
25 the bottom of the first full paragraph on page five. Do

JANA MURPHY - ADVERSE

1 you see where I've circled on the screen?

2 A Oh, I see. Yeah.

3 Q And that indicates that "runoff in the Industrial  
4 Outlot area will be directed in a biofilter to be  
5 located in the area of a former surge pond. The outlet  
6 from this biofilter will direct water to the existing  
7 Intermittent Stream C channel located in that area of  
8 the site." Did I read that correctly?

9 A Yes.

10 Q So that was the -- what the biofilter was designed  
11 to do was to collect the runoff, passively treat it, and  
12 then direct it to the existing Intermittent Stream C  
13 channel; is that right?

14 A At that time we didn't make an effort to identify  
15 the habitat communities lying outside of the biofilter.

16 Q That's not the question I asked you. I just asked  
17 you if that was what the biofilter -- this is Flambeau's  
18 words, not mine, Ms. Murphy. You understand that?

19 A Yes.

20 Q That's what the biofilter was designed to do was to  
21 direct water to the existing Intermittent Stream C  
22 channel; is that right?

23 A That's what it states here.

24 Q Okay. And then if we could turn back to page two,  
25 at the very top of page two, and this is in the

JANA MURPHY - ADVERSE

1 introduction section, again I'll circle it on the screen  
2 so you can see what I want to ask you about. It's a  
3 paragraph at the top of page two. And if you look on  
4 page one, there's a subheading called *Industrial Outlot*,  
5 and this is -- this comes under that subheading. And  
6 this says, "In addition" -- now I'm at the top of page  
7 two -- "In addition stormwater from the Industrial  
8 Outlot would be directed to a constructed biofilter  
9 located in the area of the former surge pond. Flow from  
10 the biofilter would be directed to Stream C."

11 Did I read that correctly?

12 A Yes.

13 Q And just so we're clear, the biofilter that we're  
14 talking about in this document is the same biofilter  
15 we've been looking at all morning; correct?

16 A Yes.

17 Q Now have you observed channels where water has  
18 discharged out of the biofilter outlet?

19 A Very, very small.

20 Q But the answer is yes, you have?

21 A Yes.

22 Q Okay. Have you observed more than one?

23 A Yes.

24 Q Do you know how those channels are generally  
25 formed?

JANA MURPHY - ADVERSE

1 A I believe it was by the movement of water.

2 Q And where are those channels, the channels that you  
3 observed, where are they directing the water?

4 A They're within the biofilter outlet and they run in  
5 an east/west direction.

6 Q And so how would you describe the biofilter outlet?

7 A It's a riprapped vegetated area that's lower in  
8 elevation than the surrounding biofilter berm.

9 Q And when you say *riprap*, you mean rocks?

10 A There's interspersed rocks amongst the vegetation.

11 Q What do you mean by riprap?

12 A There's rock there.

13 Q And about how -- so you said it's lower than the  
14 lip of the berm?

15 A Yes.

16 Q Okay. And then about how long is the slope of the  
17 outlet?

18 A I would estimate 20 feet.

19 Q So from the lip of the berm -- of the biofilter  
20 it's about a 20-foot distance down the slope to what?

21 A Or actually to the toe it's probably further. I  
22 haven't really observed that in detail or tried to  
23 estimate the distance.

24 Q Well, how many times have you been out there taking  
25 samples?

JANA MURPHY - ADVERSE

1 A A number of times.

2 Q Hundreds?

3 A No.

4 Q Dozens?

5 A Perhaps.

6 Q Okay. So you've been out there quite a bit --

7 A Yes.

8 Q -- fair to say? And I know maybe you haven't tried  
9 to estimate that distance before. Based on your time  
10 out there and your memory, I'm asking you to estimate it  
11 now.

12 A Then I would -- this is a rough estimate. I'd say  
13 30 feet.

14 Q Okay. So you've given us somewhere between 20 and  
15 30 feet; is that right?

16 A Yes.

17 Q Okay. And that is down to what?

18 A I would consider that to be the toe of the outer  
19 berm's slope, but I do not have a clear understanding of  
20 where the berm ends and the natural grade begins.

21 Q Okay. But your estimate is to about 20 to 30 feet.

22 A I can't really see because of the vegetation where  
23 -- where -- where the outlet ends.

24 Q Well, you were there when the biofilter was first  
25 built; right?

JANA MURPHY - ADVERSE

1 A That was back in '98.

2 Q Right. So there was no vegetation at that time;  
3 correct?

4 A No.

5 Q So there was a bunch of rocks and riprap. You  
6 observed that. You were part of that process; correct?

7 A I don't remember observing it. I was on -- I was  
8 working there, but I can't remember that far.

9 Q So the only memory you have of the biofilter outlet  
10 is when it's covered with vegetation.

11 A Yes. I have no clear picture of during  
12 construction.

13 Q What about in the winter?

14 A Yes, I'm not sure if I've been out there in winter.  
15 We don't sample in the winter.

16 Q Okay. Do you sample before the early spring?

17 A Yes.

18 Q Before the vegetation has really gotten a chance to  
19 grow and take hold.

20 A Last year's vegetation is still there.

21 Q Right. But is it -- is it -- does vegetation die  
22 off a little bit in the wintertime?

23 A A little bit. This is extremely tall grass.

24 Q Okay. So how about the times you're out there when  
25 there's less vegetation? Did you ever -- can you give

JANA MURPHY - ADVERSE

1 an estimate, a better estimate than what you just gave?

2 A No.

3 Q Okay. So it's still 20 to 30 feet?

4 A To -- to the toe approximately, the toe of the  
5 slope of the biofilter berm.

6 Q When you say *the toe of the slope of the biofilter*  
7 *berm*, what do you mean by that?

8 A Materials that were placed there by Flambeau.

9 Q Okay. So -- and for that 20 to 30 feet, that's a  
10 downward slope; correct?

11 A Yes.

12 Q And that's by design so when the water overflows,  
13 it goes down that way; correct?

14 A And just the design of a berm.

15 Q Okay.

16 THE COURT: We're going to take a 15-minute  
17 recess at this time, and for everyone's planning, we'll  
18 break for lunch from 12:15 to 1:45.

19 MR. CASSIDY: Thank you, Your Honor.

20 THE COURT: This is the only bad day I have  
21 this week. The rest of the time we'll have regular hour  
22 breaks, but I have three sentencings today.

23 MR. VAN CAMP: Your Honor, that will still be  
24 in another courtroom, is that correct, so we don't need  
25 to bother --

JANA MURPHY - ADVERSE

1 THE COURT: Yes.

2 MR. VAN CAMP: Okay. Thank you.

3 (Recess 10:15-10:30 a.m.)

4 THE COURT: Mr. Cassidy.

5 MR. CASSIDY: Thank you, Your Honor.

6 BY MR. CASSIDY:

7 Q Ms. Murphy, we were -- when we broke, you were --  
8 we were talking about the biofilter outlet and you had  
9 testified that there was riprap there and rocks. What  
10 is riprap for at the outlet?

11 A I typically see riprap used to enhance erosion  
12 control.

13 Q Okay. And why would you need to enhance erosion  
14 control at the biofilter outlet?

15 A If there's water movement.

16 Q So the riprap was put there for erosion control?

17 A Yes.

18 Q And we've been talking about sort of the area of  
19 Stream C north of Copper Park Lane. Can you tell us --  
20 can you tell the Court what the water flow relationship  
21 is between the biofilter, Stream C, and the Flambeau  
22 River?

23 MR. VAN CAMP: Objection. Foundation.

24 THE COURT: Sustained.

25 BY MR. CASSIDY:

JANA MURPHY - ADVERSE

1 Q I'm going to show you marked -- what's marked Joint  
2 Exhibit 1005.

3 MR. CASSIDY: May I approach, Your Honor? It's  
4 a multi-page exhibit.

5 THE COURT: You may.

6 Q So I've handed you what's marked Joint Exhibit 1005  
7 and it's three pages of an email exchange. Do you see  
8 your name at the top of that?

9 A Yes.

10 Q And in the parentheses it says *KMC*. What does that  
11 refer to?

12 A Kennecott Minerals Company.

13 Q Okay. So that is the company you worked for at the  
14 Flambeau Mine site?

15 A Yes.

16 Q And typically when you print out your emails, do  
17 they print out with your name above them like this?

18 A Yes.

19 Q And if you want to flip through the document, do  
20 you recognize this as an email exchange between you and  
21 Steve Donohue?

22 A Yes.

23 Q And who is Steve Donohue?

24 A Steve Donohue is -- he works for Foth, and I can't  
25 remember what his title was at that time, but as a

JANA MURPHY - ADVERSE

1 consultant for Foth.

2 Q Okay. So -- and Foth is a contractor that Flambeau  
3 Mine Company uses?

4 A Yes.

5 MR. CASSIDY: Your Honor, we move 10 -- Exhibit  
6 1005 in.

7 THE COURT: Any objection?

8 MR. VAN CAMP: Just one moment, Your Honor.

9 THE COURT: Sure.

10 (Pause at 10:34 a.m.)

11 MR. VAN CAMP: No objection.

12 THE COURT: Received.

13 MR. CASSIDY: Thank you.

14 BY MR. CASSIDY:

15 Q I'm going to go to the third page. As we discussed  
16 before, Ms. Murphy, the email, typically when you print  
17 out email exchanges, chronologically they go from the  
18 back to the front; is that right?

19 A Yes.

20 Q So if we start on the third page, I'm going to put  
21 it on the screen again, so does that indicate an initial  
22 email that was sent to you from Steve Donohue on May  
23 12th, 2004, at 3:03 p.m.?

24 A Yes.

25 Q And also cc'd on that email is J Hutchinson. Who  
JANA MURPHY - ADVERSE

1 is that?

2 A He also works for Foth as a consultant to Flambeau  
3 Mining Company.

4 Q Okay. And the subject matter of that email is  
5 Flambeau - surface water data?

6 A Yes.

7 Q And a couple minutes ago I asked you the question  
8 could you tell the Court what the flow relationship  
9 between the biofilter Stream C and the Flambeau River  
10 is; is that correct? I asked you that question?

11 A Yes, you asked the question.

12 Q And there was an objection. So I want to direct  
13 your attention here to this part of the email and  
14 Mr. Donohue asks you a similar question. "Could you  
15 clarify for me the flow relationship between the 0.9  
16 acre biofilter inlet - outlet, Stream C and Meadowbrook  
17 Creek." Do you know what Meadowbrook Creek is?

18 A Yes.

19 Q Where is Meadowbrook Creek?

20 A It's south of the mine site.

21 Q South of Copper Park Lane?

22 A Yes.

23 Q Is it a tributary to Stream C?

24 A No.

25 Q Okay. Is it a tributary to the Flambeau River?

JANA MURPHY - ADVERSE

1 A Yes.

2 Q So if we turn to page two, at the bottom of that  
3 page, does that reflect your reply to Mr. Donohue on the  
4 same day, five minutes later?

5 A Yes.

6 Q And in that reply you indicate -- I'll circle it on  
7 the screen so you can look at it -- that "The outlet of  
8 the 0.9 acre biofilter flows into Intermittent Stream C.  
9 Meadowbrook Creek is not influenced by the biofilter or  
10 Stream C. Meadowbrook Creek flows west into the  
11 Flambeau River south of the reclaimed mine site. Stream  
12 C flows southwest to the Flambeau River, just a little  
13 north of the Meadowbrook Creek outlet to the Flambeau  
14 River."

15 Did I read that correctly?

16 A Yes.

17 Q So was that your understanding at the time of the  
18 flow relationship between the biofilter, Intermittent  
19 Stream C, and the Flambeau River?

20 A Those were -- yes, that's the hydraulic gradient.

21 Q Okay. So that was your understanding of that flow  
22 relationship?

23 A The potential for flow in that relationship.

24 Q Again, potential. If there's water flowing in  
25 there, that relationship exists.

JANA MURPHY - ADVERSE

1 A Yes, if there's sufficient water.

2 Q And if we turn -- I just want to ask you quickly on  
3 the front page, this is the continuation of the email  
4 exchange. Now we're on Thursday, May 13th, 2004, and  
5 there's an email there from you to Steve Donohue, and  
6 what are you communicating to him in that email? Let me  
7 rephrase that. I'm sorry.

8 What are you communicating to him in the -- in the  
9 first paragraph of that email?

10 A It is copper concentrations in micrograms per liter  
11 at various sample sites.

12 Q So these are some of the samples that you've been  
13 collecting?

14 A Yes.

15 Q And there are various designations of sample sites  
16 there. I want to focus on the ones that are relevant to  
17 this inquiry here. If you -- what does STR-C refer to?

18 A That's referring to Stream C.

19 Q At what point?

20 A From this I can't tell.

21 Q Okay. What is the measurement that you indicate in  
22 Stream C there?

23 A 18 micrograms per liter.

24 Q And then if you go to 0.9 BF-OUT, what does that  
25 refer to?

JANA MURPHY - ADVERSE

1 A That refers to the outlet of the biofilter.

2 Q So that's a sample of water coming out of the  
3 biofilter?

4 A I'd have to look at my logbook to further confirm  
5 that.

6 Q Well, let's do the next one there. This is .9  
7 BF-IN. What does that refer to?

8 A The biofilter inlet.

9 Q Okay. So that's a sample of water coming into the  
10 biofilter?

11 A Yes.

12 Q So BF-L is a sample of water going out of the  
13 biofilter?

14 A Yes.

15 Q And what is the number that you got for that  
16 sample?

17 THE COURT: For which? Now you're talking  
18 about --

19 MR. CASSIDY: I'm sorry, Your Honor. For 0.9  
20 BF-OUT.

21 THE WITNESS: 53 micrograms per liter.

22 BY MR. CASSIDY:

23 Q So at least for this sampling event, the micrograms  
24 per liter of copper coming out of the biofilter was  
25 higher than the micrograms of copper in Stream C?

JANA MURPHY - ADVERSE

1 A With those two sample locations, yes.

2 Q Okay. I'm going to ask you to take a look at  
3 another exhibit.

4 MR. CASSIDY: Your Honor, if I haven't moved in  
5 1005, I would move it in.

6 THE COURT: It's in.

7 MR. CASSIDY: I'm sorry. Thank you.

8 BY MR. CASSIDY:

9 Q Now we're going to take a look at Joint Exhibit  
10 1003 --

11 MR. CASSIDY: May I approach, Your Honor? This  
12 is another --

13 THE COURT: You may.

14 Q This is another multi-page exhibit, which I've also  
15 put up on the screen, and if you turn to the second to  
16 last page, it may be the last page of your exhibit, but  
17 there's a signature page there. Does that indicate your  
18 name and title?

19 A Yes.

20 Q Okay. And does this exhibit reflect a letter,  
21 November 10th letter to Lawrence Lynch?

22 A Yes.

23 Q And who is Lawrence Lynch?

24 A He at that time was in the mine reclamation unit  
25 with the DNR.

JANA MURPHY - ADVERSE

1 Q So he's with Wisconsin DNR?

2 A Yes.

3 Q And did you communicate with him on occasion?

4 A Yes.

5 Q And the subject line of this letter is *Flambeau*  
6 *Mining Company - Midsummer Progress Report 2004*. Did  
7 you have to do midsummer -- did you have to do progress  
8 reports and submit them to the DNR?

9 A Yes.

10 Q So is this a document you would have created?

11 A Yes.

12 Q And you recognize the subject matter of this  
13 document?

14 A Yes.

15 Q And it was created during the time of your  
16 employment within the scope of your employment at  
17 Flambeau Mine Company?

18 A Yes.

19 MR. CASSIDY: Your Honor, we move 1003 in.

20 MR. VAN CAMP: Your Honor, I object as  
21 relevance. This is from 2004.

22 MR. CASSIDY: I can ask a question that might  
23 establish relevance, Your Honor.

24 THE COURT: You can try.

25 BY MR. CASSIDY:

JANA MURPHY - ADVERSE

1 Q If we turn to the page that has your signature, and  
2 I'll just mark it on the screen, there's a paragraph  
3 nine that says *Conclusion*, and a couple paragraphs up  
4 from that I've circled on the screen. That paragraph  
5 reads: "Copper and zinc concentrations have measured in  
6 offsite background stormwater runoff and in runoff from  
7 the Industrial Outlot located on the reclaimed mine  
8 site. The nonpoint resources of runoff from the  
9 Industrial Outlot are being passively treated by the 0.9  
10 acre biofilter that substantially reduces the  
11 concentrations of metals before flowing into  
12 Intermittent Stream C that eventually discharges to the  
13 Flambeau River."

14 Did I read that correctly?

15 A You read it correctly.

16 Q So that was your representation of the flow at that  
17 time to DNR from the biofilter into Stream C and to the  
18 Flambeau River?

19 A I am not sure the last part, that eventually  
20 discharges to the Flambeau River, if that's referencing  
21 flow from the biofilter or actually Intermittent Stream  
22 C.

23 Q Okay. And when you -- but we've already  
24 established that the flow from the biofilter comes down  
25 and enters into flow from Intermittent Stream C;

JANA MURPHY - ADVERSE

1 correct?

2 MR. VAN CAMP: Objection. It mischaracterizes  
3 her testimony.

4 THE COURT: Sustained.

5 BY MR. CASSIDY:

6 Q Well, what are you telling DNR here?

7 MR. VAN CAMP: Objection. Relevance.

8 THE COURT: Overruled. She doesn't have to  
9 read it again.

10 THE WITNESS: What I'm telling the DNR is that  
11 the biofilter, comparing what comes in and what may go  
12 out, that it's reducing those constituents that we're  
13 sampling.

14 BY MR. CASSIDY:

15 Q That's what you're telling them about the  
16 biofilter. What are you telling them about where it  
17 goes?

18 A And where it goes, again, is the -- out of the  
19 biofilter and into the watershed of Stream C, the  
20 potential, you know, where potentially it could go if  
21 there's sufficient water.

22 Q And here you use the term eventually discharges  
23 into the Flambeau River. Is that where that water can  
24 potentially go?

25 A Potentially.

JANA MURPHY - ADVERSE

1 MR. CASSIDY: Your Honor, we move this exhibit  
2 in.

3 MR. VAN CAMP: Objection. Relevance.

4 THE COURT: Overruled, and received.

5 MR. CASSIDY: Thank you, Your Honor.

6 BY MR. CASSIDY:

7 Q I'm going to show you another exhibit, Exhibit 45,  
8 another joint exhibit. Are you familiar with a  
9 consultant named Blue Iris?

10 A Yes.

11 Q How are you familiar with Blue Iris?

12 A They've conducted ecological monitoring and bio  
13 monitoring as it related to the Flambeau Mine site.

14 Q You may, Ms. Murphy, have this document in that  
15 folder. It's Exhibit 45. If you don't, I can --

16 MR. CASSIDY: May I approach, Your Honor?

17 THE COURT: You may.

18 Q And so Blue Iris is a consultant that has been  
19 hired by Flambeau Mine Company to conduct assessments?

20 A Yes.

21 Q And did you -- did you directly hire them or were  
22 they hired through someone else typically?

23 A In this case they were hired -- it appears they  
24 were hired through Foth Van Dyke.

25 Q And Foth Van Dyke is also a consultant of Flambeau  
JANA MURPHY - ADVERSE

1 Mining Company?

2 A Yes.

3 Q So you're looking at a letter that's dated October  
4 24th, 2005, and on the second page do you see your  
5 signature?

6 A Yes.

7 Q And what are you -- and again, this is a letter to  
8 Lawrence Lynch with Wisconsin DNR?

9 A Yes.

10 Q And what are you, generally what are you  
11 communicating or transmitting to him in this letter?

12 A It's an attachment and a summary of the work that  
13 had been conducted by Blue Iris.

14 Q And by transmitting this to the DNR, you're doing  
15 that on behalf of the Flambeau Mining Company; right?

16 A Yes.

17 Q So you adopted the assessment and the information  
18 that you've received from Blue Iris and you're sending  
19 that along to the state regulator?

20 A Yes.

21 Q Did you have a chance to review the bioassessment  
22 or the information that you had -- you were given here  
23 before you sent it to DNR?

24 A I would say yes.

25 Q And in fact, the memo that is attached is dated --  
JANA MURPHY - ADVERSE

1 and this is the memo on page three -- is dated -- the  
2 memo from Foth and Van Dyke to you is dated October  
3 10th, 2005; is that right?

4 A Yes.

5 Q And you did not send this on to Mr. Lynch at DNR  
6 until two weeks later; right?

7 A Right.

8 Q And so did you -- did you send it on without  
9 looking at it or did you review it at the time?

10 A My standard practice is to review documents.

11 Q Okay. Did you make any changes or suggest any  
12 edits back to Blue Iris or Foth?

13 A We usually have comments, but at the end there's a  
14 final draft that goes on to DNR.

15 Q Right.

16 MR. CASSIDY: Your Honor, we move Exhibit 45.

17 MR. VAN CAMP: Objection. Relevance. And  
18 objection, foundation to the memo.

19 THE COURT: Overruled, and received.

20 MR. CASSIDY: Thank you, Your Honor.

21 BY MR. CASSIDY:

22 Q I'm going to turn your attention, direct your  
23 attention to the bio assessment of Stream C, which is  
24 the -- contained in the Foth memo. So it's about  
25 halfway in to the document. Do you see that page,

JANA MURPHY - ADVERSE

1 Ms. Murphy? I have it up on the screen as well.

2 A Yes, I see it.

3 Q Now this was -- what was the purpose of the bio  
4 assessment of Stream C?

5 A It was part of -- in the process of working with  
6 the DNR to evaluate the stream, this was one of the  
7 tasks that was implemented by Flambeau.

8 Q To -- when you say *evaluate the stream*, what are  
9 you talking about?

10 A To assess what type of stream it was, what kind of  
11 biota might be in it, make general observations.

12 Q Okay. And in that first paragraph there, sort of  
13 the introductory paragraph, circled on the screen, it  
14 reads that "Stream C includes drainage from locations  
15 east of Highway 27 and along the west side of Highway  
16 27. An Industrial Outlot and associated parking lot,  
17 reclaimed rail line and biofilter pond drain into Stream  
18 C." Did I read that correctly?

19 A Yes.

20 Q And did you -- do you remember making any changes  
21 to that part or suggesting any changes to that part when  
22 you received this bio assessment from Blue Iris?

23 A I don't remember anything as far as any comments  
24 because of the time, the length of time since it's  
25 happened.

JANA MURPHY - ADVERSE

1 Q Later on in the paragraph it says, "Stream C flows  
2 under Copper Park Lane from the north and then takes a  
3 meandering southwest direction through woodland to the  
4 confluence with the Flambeau River." Do you see that?

5 A Yes.

6 Q And that's also your understanding of where Stream  
7 C goes?

8 A That's as the channel lies, yes.

9 Q Okay. If you turn to the next page -- I'm sorry,  
10 before we leave that, further down there's a section  
11 called *Stream Habitat and Characteristics* and the first  
12 section there, first sentence there says, "Stream flow  
13 upstream of Copper Park Lane is unchannelized. Obvious  
14 flow originates from the wetland area to the north and  
15 east as well as the biofilter pond." Do you see that?

16 A Yes.

17 Q And would you disagree with Blue Iris's  
18 characterization?

19 A I would say it has the potential, but not on all  
20 occurrences.

21 Q So it's intermittent?

22 A Yes.

23 Q And you say -- so when they say *obvious flow*, they  
24 don't say constant flow; right?

25 A No, they don't say constant flow.

JANA MURPHY - ADVERSE

1 Q But would you agree that there's obvious flow?

2 A At times.

3 Q And then -- and just so we're clear, that's stream  
4 flow upstream of Copper Park Lane.

5 A Yes.

6 Q So if we turn to the next page, which is page two  
7 of this memo, and go all the way to the bottom, we'll  
8 talk a little bit about the biota that you mentioned  
9 earlier. This sentence is going to run on to the next  
10 page, but it says, "One normally associates water  
11 quality with various types of aquatic  
12 macroinvertebrates. In particular, the presence of  
13 members of Ephemeroptera," that's my best try,  
14 "Trichoptera, and Plecoptera" -- please correct me if I  
15 got those wrong, you're the biology major -- but on the  
16 next page they say "those species are indicative of high  
17 water quality. The observation that those species make  
18 up a significant portion -- proportion of the insect  
19 inhabitants suggests that water quality sufficient to  
20 support sensitive species, other conditions being  
21 satisfied." Did I read that correctly?

22 A Yes.

23 Q And that's -- and then finally there's a fish  
24 assessment done. Do you see that there?

25 A I see the section *Fish Assessment*.  
JANA MURPHY - ADVERSE

1 Q Okay. And at the very bottom of that paragraph,  
2 Blue Iris concluded that during periods of high flow,  
3 there is no reason to suspect that fish would not  
4 migrate upstream (or conversely migrate out of the  
5 biofilter downstream). In conversations with Jana  
6 Murphy (Kennecott Minerals on-site representative), fish  
7 were observed in Stream C in June 2005 after a period of  
8 significant rainfall."

9 Did I read that correctly?

10 A Yes.

11 Q And do you remember telling Blue Iris about the  
12 fish you saw in Stream C?

13 A I have a general recollection. I don't  
14 specifically remember, but...

15 Q Do you remember seeing fish in Stream C?

16 A Yes.

17 Q Okay. And do you remember seeing fish in Stream C  
18 north of Copper Park Lane?

19 A No.

20 Q Do you remember seeing fish in the biofilter?

21 A Yes.

22 Q Did you see any other aquatic life in the  
23 biofilter?

24 A Frogs, toads, aquatic insects, turtles, birds -- I  
25 guess they're aquatic, aren't they.

JANA MURPHY - ADVERSE

1 Q They can be. So do you have any reason to disagree  
2 with Blue Iris's statement here that during high flow  
3 there's not reason to expect the fish will migrate  
4 upstream to the biofilter?

5 A I have --

6 MR. VAN CAMP: Object to the form of the  
7 question.

8 MR. CASSIDY: I'll withdraw it, Your Honor.  
9 That's fine.

10 BY MR. CASSIDY:

11 Q Did you -- you remember doing any edits to that  
12 portion of Blue Iris's assessment before you sent it to  
13 DNR?

14 A Given the data, I don't remember what edits or that  
15 things were edited. So...

16 Q Is it fair to say that because Flambeau sent this  
17 to the state regulator, that they had adopted this  
18 assessment?

19 A Yes.

20 Q Okay. Take a look at what's marked Joint Exhibit  
21 1007.

22 MR. CASSIDY: And may approach, Your Honor?

23 THE COURT: You may. You don't need to ask.

24 MR. CASSIDY: Thank you, Your Honor. Sorry  
25 about that.

JANA MURPHY - ADVERSE

1 BY MR. CASSIDY:

2 Q I've handed you Joint Exhibit 1007 and this is  
3 entitled *Biofilter Sediment Deposition Monitoring* and  
4 you see at the bottom there that it indicates it was  
5 updated by you October of 2005; is that correct?

6 A Yes.

7 Q So do you recognize this document?

8 A Yes.

9 Q And then the second page, just briefly there's a  
10 section that lists the name or title of the person in  
11 charge of the facility and your name is listed there.  
12 Do you see that?

13 A Yes.

14 Q And if you turn to page three of this document, put  
15 it on the screen, this is -- so this is a document that  
16 was updated by you?

17 A Yes.

18 Q Okay. And there under the title *Biofilter Sediment*  
19 *Deposition Monitoring*, you indicate a "0.8 acre  
20 biofilter was constructed near the discharge point of  
21 surface water drainage from the southern portion of the  
22 former mine site to Stream C during the site  
23 reconstruction -- restoration activities in the late  
24 1990s. The biofilter allows settling of suspended  
25 solids from the surface water to settle out prior to

JANA MURPHY - ADVERSE

1 delivering the water to Stream C." Do you see that?

2 A Where were you reading?

3 Q I'm sorry. It's the top of this paragraph where I  
4 circled.

5 A Yeah -- yes, I see that.

6 Q And did I read that correctly?

7 A Yes.

8 Q So we talked about this already, but this is  
9 another document indicating that the design of the  
10 biofilter was to deliver the water to Stream C?

11 A Well, it says *Stream C*, that Stream C watershed.

12 MR. CASSIDY: Okay. Your Honor, we move Joint  
13 Exhibit 1007.

14 THE COURT: Any objection?

15 MR. VAN CAMP: No objection.

16 THE COURT: Received.

17 BY MR. CASSIDY:

18 Q Do you, as part of your duties, I think you  
19 mentioned earlier communicate with the public or the  
20 press on occasion?

21 A Yes.

22 Q Okay. And do you recall communicating with the  
23 public or the press about -- about issues related to  
24 this, this case?

25 A In a general sense, yes.

JANA MURPHY - ADVERSE

1 Q Okay. Did you ever draft up any documents or press  
2 releases?

3 A With assistance, yes.

4 Q Who would assist you?

5 A We would work as a team.

6 Q Who is we?

7 A Perhaps -- I don't remember at that time, but  
8 typically I may draft something and then someone will  
9 review it, either my boss or if I'm working with a PR  
10 person at that time.

11 Q Okay. But you're involved in the process?

12 A Yes.

13 Q And typically once it's reviewed and gone through  
14 its reviews, would you then be the one communicating it  
15 to the public?

16 A Usually, yes.

17 Q All right. Have you look at Exhibit 3. I'll hand  
18 you a copy. Do you recognize that document?

19 A It looks familiar. I -- specifically I don't have  
20 a strong memory of it.

21 Q Okay. How does it look familiar?

22 A Again, just as we stated earlier, it's a -- I  
23 actually don't know what -- where this went or what it  
24 was for. It appears to be a write-up, but I'm not sure  
25 how it was used.

JANA MURPHY - ADVERSE

1 Q Do you remember being involved in the write-up?

2 A I'd have to -- I assume I was.

3 Q And you assume you were because it involves a lot  
4 of environmental and reclamation matters at Flambeau  
5 Mine site?

6 A Yes.

7 Q So this is a document you're pretty sure was  
8 produced by Flambeau Mine?

9 MR. VAN CAMP: Objection. Foundation.

10 THE COURT: Are you able to answer that  
11 question, Ms. Murphy?

12 THE WITNESS: I need to look at it further to  
13 see how references are made to Flambeau Mine; just tell  
14 if the person -- how -- who the message is coming from.

15 BY MR. CASSIDY:

16 Q Were you involved in the document production during  
17 the course of this case, producing documents to lawyers  
18 and then --

19 A There's thousands of documents and I required  
20 assistance with that.

21 Q Okay. Do you know how those documents were Bates  
22 labeled?

23 A Yes.

24 Q And does this document reflect a Bates label that  
25 would indicate to you that it came from the Flambeau

JANA MURPHY - ADVERSE

1 Mine Company?

2 A Yes.

3 Q And that's at the bottom right-hand corner where it  
4 says *FMC013810*.

5 A Yes.

6 Q So does that tell you that this was a document that  
7 you had in your files at Flambeau Mine Company?

8 A Yes.

9 Q Okay. And if you look at it, if you read it, can  
10 you tell whether it was a document that was generated by  
11 Flambeau Mine or if it was a document that was sent to  
12 you?

13 A What I can see towards the end leads me to believe  
14 it was generated by the Flambeau Mining Company.

15 MR. CASSIDY: Your Honor, we'd move Exhibit 3  
16 into evidence.

17 THE COURT: Any objection?

18 MR. VAN CAMP: Just one moment, Your Honor.

19 (Pause) No objection.

20 THE COURT: Received.

21 MR. CASSIDY: Thank you, Your Honor.

22 BY MR. CASSIDY:

23 Q Just generally, Ms. Murphy, what is this document  
24 about?

25 A It appears to be an overview of --  
JANA MURPHY - ADVERSE

1 Q I'm sorry. I'm sorry to interrupt you.

2 MR. CASSIDY: Your Honor, I'm going to withdraw  
3 the question.

4 THE COURT: You may.

5 MR. CASSIDY: The document is in. It speaks  
6 for itself. Thank you, Ms. Murphy.

7 BY MR. CASSIDY:

8 Q I'm going to show you a different document,  
9 hopefully this will be a little more familiar. It's  
10 document 1006. And actually before I do that, what is  
11 your understanding of the biofilter's ability, if any,  
12 to influence copper levels in Stream C?

13 A The potential, if removal isn't taking place, is  
14 the potential of copper leaving the biofilter and into  
15 the adjacent environment.

16 Q And that would include Stream C?

17 MR. VAN CAMP: Objection. Foundation.

18 THE COURT: Sustained.

19 BY MR. CASSIDY:

20 Q Okay. Well, let's look at a document then. It's  
21 1006. And if you turn to page six of that document, do  
22 you see your signature?

23 A Yes.

24 Q Is this document another letter that you wrote to  
25 Larry Lynch at Wisconsin DNR?

JANA MURPHY - ADVERSE

1 A Yes.

2 Q And this letter is dated August 5th, 2004?

3 A Yes.

4 Q And the subject matter of the letter is "Proposed  
5 Monitoring Plan for Intermittent Stream C." What is the  
6 -- what are you referencing when you talk about the  
7 Proposed Monitoring Plan for Intermittent Stream C?

8 A The stream that flows past the mine site and the  
9 watershed that is in that area and the channel that is  
10 through the woods and to the river.

11 Q And this is -- you're getting a Monitoring Plan  
12 together for that stream; is that correct?

13 A Yes, yes.

14 Q All right. And that's what this letter is about?

15 A Yes.

16 Q Okay. And I had just asked you a question about  
17 your understanding of the biofilter's ability, if any,  
18 to influence copper levels in Stream C. And if you turn  
19 to page two, under the section *Biofilter Monitoring*, you  
20 told Mr. Lynch in 2004 the biofilter has two factors  
21 that influence its ability to control the copper levels  
22 discharged into Intermittent Stream C; the influent  
23 characteristics in the sediment that has been collected  
24 to date; is that correct?

25 A Yes, that's what it says there.

JANA MURPHY - ADVERSE

1 Q And that's what you wrote?

2 A That's what I wrote.

3 Q Okay. And so those are the ways -- is it fair to  
4 say those are the ways the biofilter has the ability to  
5 control copper levels discharged into Intermittent  
6 Stream C?

7 A Let me read that again. I don't agree with this in  
8 its entirety. There's -- I believe there's additional  
9 factors.

10 Q So are those additional factors set forth -- well,  
11 I'll just ask you what are those additional factors?

12 A The -- with as far as the sediment collected today,  
13 if that's referring to its depth and the retaining, time  
14 of retention within the biofilter, then yes, I agree  
15 with that.

16 Q Okay. But you said there were additional factors.  
17 There are more than two factors. There's more than two  
18 ways that the biofilter would influence the ability to  
19 control the copper levels discharged into Intermittent  
20 Stream C, and I'm just trying to get an understanding  
21 about what the additional factors are.

22 A This, in my opinion, is the primary, and  
23 additionally there's other factors that in detail I  
24 can't speak but may be related to biological uptake.

25 Q Okay. So there are other factors that would -- we  
JANA MURPHY - ADVERSE

1 can agree there are other factors other than what you've  
2 listed here, so there's at least two and there's going  
3 to be more; right?

4 A That I don't know.

5 Q Well, okay. I want to be clear. Here you say  
6 there are two factors that influence the ability to  
7 control copper levels discharged into Intermittent  
8 Stream C. What I thought I heard your testimony just  
9 now was there are additional factors. Is that what you  
10 just said?

11 A Additional factor or factors. To what degree I  
12 don't know.

13 Q Okay. Fair enough. So there's at least two,  
14 but -- and there's more, we just don't know how many  
15 more.

16 A I don't.

17 Q You don't. You know, we talked about the Stream C  
18 watershed and used various terms, but how do you define  
19 the Stream C system?

20 MR. VAN CAMP: Objection. Vague.

21 THE COURT: Sustained.

22 BY MR. CASSIDY:

23 Q Can you turn to page four of your letter,  
24 Ms. Murphy. And just so we know what section we're  
25 under, on page three there's a subheading 2. *Stream C*

JANA MURPHY - ADVERSE

1 watershed evaluation and biological assessment; is that  
2 right?

3 A What section?

4 Q On page three, it's Section 2. entitled *Stream C*  
5 *Watershed Evaluation and Biological Assessment*.

6 A Okay. Yes.

7 Q So that section continues over on to page four and  
8 your -- in this section you're communicating to DNR the  
9 purpose of the biological assessment; is that correct?

10 A I have to review this. Could you repeat your  
11 question?

12 Q After you've reviewed it, what are you  
13 communicating about, in Section 2 to the DNR?

14 A It -- in Section 2, we're communicating some  
15 explanation as to sample points as part of the Stream C  
16 watershed evaluation.

17 Q And that includes the biological assessment?

18 A Yes.

19 Q And then when you get to the end of the section and  
20 you're on page four, you write -- I've circled it on the  
21 screen just before Section 3 -- you write: "The  
22 biological assessment will include the entire Stream C  
23 system, from upstream of the Flambeau Mine site to the  
24 confluence with the Flambeau River." Did I read that  
25 correctly?

JANA MURPHY - ADVERSE

1 A Yes.

2 Q I'm going to show you another document, it's  
3 Exhibit 9 --

4 MR. CASSIDY: I'm sorry, Your Honor. I would  
5 like to move into evidence 1006.

6 MR. VAN CAMP: Objection. Relevance. This is  
7 an '04 document.

8 THE COURT: I'm sorry, what else did you say?

9 MR. VAN CAMP: It's a 2004, '04 document.

10 THE COURT: Overruled, and received.

11 MR. CASSIDY: Thank you, Your Honor.

12 THE COURT: And the document you're now  
13 introducing?

14 MR. CASSIDY: Exhibit 9, Your Honor.

15 BY MR. CASSIDY:

16 Q I asked you a few questions, so we were talking  
17 about that was a Monitoring Plan letter exchange between  
18 you and DNR, and was there, in fact -- and that referred  
19 to a proposed Monitoring Plan. Was there, in fact, a  
20 Monitoring Plan that was undertaken for Stream C?

21 A Yes.

22 Q And this exhibit, I've handed you Exhibit 9 which  
23 is a letter dated September 15th, 2004, to yourself.  
24 And if you turn to the second page, it is signed by  
25 Lawrence Lynch, who we've seen other communications

JANA MURPHY - ADVERSE

1 between you. He's with the DNR; correct?

2 A Yes.

3 Q So is this a letter you received from Lawrence  
4 Lynch?

5 A Yes.

6 Q And does it involve the Monitoring Plan for  
7 Intermittent Stream C?

8 A Yes.

9 Q Okay. Is this a letter you would have saved in  
10 your files?

11 A Yes.

12 Q And you also see the Bates stamp at the bottom  
13 right; again, it's the FMC Flambeau Mining Company Bates  
14 stamp?

15 A Yes.

16 Q It's a letter you would have kept in the regular  
17 course of your business as the Environmental and  
18 Reclamations Manager?

19 A Yes.

20 MR. CASSIDY: Your Honor, we move Exhibit 9.

21 MR. VAN CAMP: Objection. Hearsay.  
22 Foundation.

23 THE COURT: Sustained.

24 MR. CASSIDY: Your Honor, is it sustained on  
25 both --

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1 THE COURT: Well, it certainly is sustained on  
2 hearsay grounds.

3 MR. CASSIDY: In that case, Your Honor, I would  
4 offer it not for the truth, but I'm going to offer it  
5 for -- to show what effect, if any, it had on  
6 Ms. Murphy's Sampling Plan.

7 THE COURT: You can ask her that.

8 MR. CASSIDY: Okay.

9 THE COURT: But I'm not receiving the document.

10 MR. CASSIDY: Understood, Your Honor.

11 BY MR. CASSIDY:

12 Q When you received this letter, if you look on --  
13 page one, point one, it talks about sampling points in  
14 Stream C. Do you see that?

15 A Yes.

16 Q And does that indicate a particular sampling point  
17 SW-C7?

18 MR. VAN CAMP: I'll object as relevant in the  
19 2000 --

20 THE COURT: Sustained. Did you do anything  
21 different as a result of that letter with respect to  
22 sampling?

23 THE WITNESS: Yes.

24 BY MR. CASSIDY:

25 Q What did you do?

JANA MURPHY - ADVERSE

1 A I -- I collected a sample outside or down the  
2 outlet of the -- the outlet area of the culverts under  
3 the former rail spur.

4 Q And where is that in relation to the biofilter?

5 A It's to the north.

6 Q So is it upstream?

7 A Speaking in a watershed perspective, yes.

8 Q How did you know where to collect that sample?

9 A Because I believe it's described here. The  
10 distance isn't that far really.

11 Q The distance from where?

12 A From the biofilter outlet to the former railroad  
13 spur, and Larry is stating here to collect the sample  
14 upstream from what -- as you had read. He's stating it  
15 as the confluence of Stream C and the outlet from --

16 THE COURT: Just tell us what you did as a  
17 result of doing it.

18 THE WITNESS: Okay. Sorry. I collected a  
19 sample north, between -- I collected a sample south of  
20 the railroad culverts and north of the biofilter outlet.

21 BY MR. CASSIDY:

22 Q And my question is just how did you know where to  
23 collect the sample?

24 A Because I know where the biofilter outlet is and I  
25 know where the culverts are.

JANA MURPHY - ADVERSE

1 Q But what in this letter --

2 THE COURT: But that letter is not in evidence.

3 MR. CASSIDY: I understand.

4 Q So how did this letter affect where you collected  
5 your sample?

6 A Because from what I've read is that Larry wanted a  
7 sample upstream as far as, in a watershed way, from the  
8 biofilter outlet.

9 Q Well, do you know why he wanted that sample?

10 MR. VAN CAMP: Objection. Foundation.

11 THE COURT: Sustained.

12 BY MR. CASSIDY:

13 Q Did you relocate any other samples based on this  
14 letter? Just to try to speed along, I'll direct your  
15 attention to point six, if that helps.

16 A It -- he is approving the location of SW-C5, which  
17 we've already -- we had been -- we had been sampling  
18 that downstream of Copper Park Lane.

19 Q And had you changed that location?

20 A Yes.

21 Q To where?

22 A On the inlet side of the farmer's culvert.

23 Q So that would be upstream of Copper Park Lane?

24 A Well, that's too general a way to describe it. We  
25 reference the farmer's culvert, so it's at the inlet of  
JANA MURPHY - ADVERSE

1 the farmer's culvert where water flows into the farmer's  
2 culvert.

3 Q Okay. And I'm just saying that's north of Copper  
4 Park Lane.

5 A Yeah, that's north.

6 Q Okay. How did -- the first sample that you talked  
7 about that was north of the biofilter that you started  
8 to take as a result of this letter, how did you take  
9 that sample? Physically how did you do it?

10 A I would walk out there and try to find a spot that  
11 was accessible. There was -- it seems generally there's  
12 a pool of water there in a wetland area, so it was just  
13 a matter of trying to find someplace probably halfway  
14 between the railroad culvert and the outlet.

15 Q And these are surface water samples we're talking  
16 about?

17 A Yes.

18 Q Is it part of your job -- strike that. When you're  
19 taking -- when you're taking those surface water  
20 samples, how are you collecting them? And I'm speaking  
21 -- I'm going to limit it to north of Copper Park Lane.

22 MR. VAN CAMP: Objection. Asked and answered.

23 THE COURT: Sustained.

24 BY MR. CASSIDY:

25 Q Do you have a specific method that you use to  
JANA MURPHY - ADVERSE

1 collect the water?

2 A If sufficient water is present, then we'll use a  
3 clean plastic scoop to dip water.

4 Q How big is the clean plastic scoop?

5 A It is probably between half liter and a liter as  
6 far as the scoop part.

7 Q Okay. And was there -- and I'm talking about the  
8 samples you collected north of Copper Park Lane, was  
9 there always sufficient water to use the scoop when you  
10 were collecting samples?

11 A If I collected samples, then yes.

12 Q Okay. Do you know if Stream C has a high water  
13 mark north of Copper Park Lane?

14 MR. VAN CAMP: Object to the form of the  
15 question. Vague.

16 THE COURT: Sustained.

17 BY MR. CASSIDY:

18 Q Do you know what a high water mark is?

19 A There's different definitions.

20 Q What is your understanding?

21 A It depends upon what you're observing.

22 Q Well, if you're observing a stream, what would be  
23 the high water mark?

24 MR. VAN CAMP: Objection. Vague.

25 THE COURT: Sustained.

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1 BY MR. CASSIDY:

2 Q Did you ever observe a high water mark in Stream C  
3 north of Copper Park Lane?

4 MR. VAN CAMP: Same objection.

5 THE COURT: Sustained.

6 BY MR. CASSIDY:

7 Q Do you know if -- do you know if Stream C has  
8 discernible banks north of Copper Park Lane?

9 A A short section where the mining company disturbed  
10 the channel as it's enhanced with riprap for erosion  
11 control, and in that area, I would say there's a visible  
12 bank, so to speak.

13 Q What area is that? Would it help if I --

14 A That's just north of the inlet of the culvert under  
15 Copper Park Lane, just immediately adjacent.

16 Q So just north of the inlet flowing down into Copper  
17 Park Lane, that's the area you were speaking of?

18 A Yes.

19 Q Okay. Have you ever seen water flowing in Stream C  
20 south of the biofilter?

21 MR. VAN CAMP: Objection to the form of the  
22 question.

23 MR. CASSIDY: I'll rephrase that, Your Honor.

24 BY MR. CASSIDY:

25 Q Have you ever seen water flowing south of the  
JANA MURPHY - ADVERSE

1 biofilter and north of Copper Park Lane, in that  
2 section?

3 MR. VAN CAMP: Objection to the form of the  
4 question. Objection. Foundation.

5 THE COURT: Sustained.

6 BY MR. CASSIDY:

7 Q Do you keep logbooks, Ms. Murphy?

8 A Yes.

9 Q And have you been keeping logbooks since you were  
10 -- since you've been working at the mine site?

11 A The mining company has kept logbooks, whether --  
12 it's whomever is doing the field work.

13 Q Okay. And do you make -- so you make entries in  
14 those logbooks?

15 A Yes.

16 Q All right. I'd like to show you a couple entries  
17 from your logbooks, and this is Exhibit 6. When you  
18 make those entries, you're doing that on behalf of  
19 Flambeau Mining Company as part of your job?

20 A Yes.

21 Q And those are made at or near the time of the  
22 events you're witnessing?

23 A Yes.

24 Q And I just handed you what is marked plaintiffs'  
25 exhibit or Exhibit 6 and it has -- it's a copy of a

JANA MURPHY - ADVERSE

1 cover of a *Wright in the Rain All-weather Level Book*.

2 Are you familiar with those types of logbooks?

3 A Yes.

4 Q Those are the ones you can go out in the rain and  
5 it doesn't get blurry?

6 A Right.

7 Q And there's some dates indicated at the top. Do  
8 you recognize that handwriting?

9 A That's my handwriting.

10 Q Are you indicating a range of dates for this  
11 logbook?

12 A Yes.

13 Q Okay. And if you could turn to the last two pages  
14 of that exhibit, and do you see -- they're also on the  
15 screen there. Do you see that?

16 A Yes.

17 Q So do you typically date the days you're out there  
18 sampling?

19 A Yes.

20 Q And so here you've dated -- you've indicated a date  
21 9 -- September 15th, '04 and it's called *Intermittent*  
22 *Stream C Sampling*. Do you see that?

23 A Yes.

24 Q And is this your handwriting?

25 A Yes.

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1 Q All right. So on that date that you've entitled  
2 Intermittent Stream C Sampling, where were you  
3 collecting samples?

4 THE COURT: I'm sorry, where do you see  
5 Intermittent Stream C Sampling?

6 MR. CASSIDY: I'm sorry, Your Honor. I've  
7 circled it in red up at the top.

8 THE COURT: It doesn't say Intermittent Stream  
9 C.

10 MR. CASSIDY: You are correct, Your Honor.  
11 BY MR. CASSIDY:

12 Q What does that say there?

13 A Behind -- at the very top or the first horizontal  
14 line?

15 Q The line next to 9-15-04.

16 A That says *I-n-t Stream C Sampling* and I-n-t stands  
17 for Intermediate.

18 MR. CASSIDY: Thank you, Your Honor.

19 THE COURT: Intermediate?

20 THE WITNESS: I-n-t is just my shorthand.

21 THE COURT: But it's for intermediate, not for  
22 intermittent?

23 THE WITNESS: I'm sorry, yes. Thank you.

24 THE COURT: But it is Stream C.

25 THE WITNESS: Yes, intermittent. Yes.  
JANA MURPHY - ADVERSE

1 BY MR. CASSIDY:

2 Q So where were you on this date that you indicated  
3 you're sampling at Intermittent Stream C, where were you  
4 collecting samples?

5 MR. VAN CAMP: Objection. Relevance. This is  
6 2004.

7 MR. CASSIDY: Your Honor, it goes to where the  
8 stream is and where it begins and where Flambeau's  
9 understanding.

10 THE COURT: Eight years ago --

11 MR. CASSIDY: I can --

12 THE COURT: Seven years ago.

13 MR. CASSIDY: I'm going to bring it forward in  
14 terms of -- and we can establish that the stream, you  
15 know, until perhaps recently, they were taking samples  
16 in the same places.

17 THE COURT: Let's bring it more recent.

18 BY MR. CASSIDY:

19 Q Your Honor -- I'm sorry. Ms. Murphy, was this  
20 sampling part of the proposed Monitoring and Sampling  
21 Plan for Intermittent Stream C?

22 MR. VAN CAMP: Objection. Relevance. I think  
23 he's still referring to the same thing.

24 THE COURT: Are you still talking about this?

25 MR. CASSIDY: I'm talking generally, your  
JANA MURPHY - ADVERSE

1 sampling.

2 THE COURT: So we should take this off the  
3 screen and she should just set down those papers. Now  
4 your question?

5 BY MR. CASSIDY:

6 Q Have you taken monitoring and sampling data in  
7 Intermittent Stream C in the past?

8 A Yes.

9 Q And in that time, have you -- are there certain  
10 sample points that you take samples from?

11 A There's many sample points, yes.

12 Q Okay. And how have those sample points changed, if  
13 any -- if at all since 2004?

14 A There were various phases of under what Plan we  
15 were sampling, different -- different plans. It might  
16 have been the Assessment Plan or the Biofilter  
17 Management Plan or most recently the stipulation.

18 Q Okay. I'm going to put back up on the screen  
19 Exhibit 10 -- 1024. And are there certain areas -- are  
20 there certain points on that exhibit where you have been  
21 collecting surface water samples?

22 MR. VAN CAMP: Objection. Vague as to time.

23 THE COURT: Sustained.

24 BY MR. CASSIDY:

25 Q Well, let's go -- let's go -- let's talk about  
JANA MURPHY - ADVERSE

1 2004.

2 THE COURT: No, let's not.

3 MR. CASSIDY: I'm trying to get specific as to  
4 time.

5 THE COURT: Let's talk about --

6 MR. CASSIDY: Do you want me to walk backwards,  
7 Your Honor, from --

8 THE COURT: No, I want to you walk recent.

9 MR. CASSIDY: Okay.

10 BY MR. CASSIDY:

11 Q How about last year? Were you taking samples out  
12 anywhere on this document that you see? Do you see the  
13 map on the screen?

14 A Yes. I see the map.

15 Q Okay. Are there points along this map -- sorry  
16 about the glare -- where you have -- where last year you  
17 took samples, surface water samples as part of your job?

18 A This shows two of several others.

19 Q Can you mark on here the two points where you were  
20 taking surface water samples last year?

21 A (Witness indicates)

22 Q Just so we're clear, where have you marked?

23 A I've marked the inlet of the farmer's culvert  
24 that's east of the biofilter and north of Copper Park  
25 Lane.

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1 Q Okay. That's one place. Where was the other  
2 place?

3 A The other place I collected water was the biofilter  
4 outlet.

5 Q Okay. That's two. And then we just discussed a  
6 letter from DNR that you indicated caused you to collect  
7 samples upstream. Were you still collecting those  
8 samples last year?

9 A No.

10 Q When did you stop collecting those samples?

11 A I do not remember. I know for the Biofilter  
12 Management Plan that was approved, that location wasn't  
13 specified as a sampling location.

14 Q When was that Biofilter Management Plan approved?

15 A I'd have to look at the document to remember.

16 Q Okay. When -- but from -- so when did you -- so  
17 you don't remember when you stopped taking samples  
18 there?

19 A It was a number of years ago.

20 Q Okay. And did you give these sample points -- did  
21 you know them by designation? Were they given a number?

22 A Yes.

23 Q Okay. What were the numbers for the two you've  
24 indicated?

25 A We've got, for the one shown at the inlet of the  
JANA MURPHY - ADVERSE

1 farmer's culvert, that was known as SW-C5. And the --  
2 where I collected water from the outlet, that's known as  
3 BFSW-2.

4 Q And so that was two thousand -- that was last year,  
5 2011?

6 A Yes.

7 Q How about 2010? Were you collecting samples at  
8 those locations then?

9 A Yes.

10 Q And do you remember if you were collecting samples  
11 at any other locations on this map in 2010?

12 A This map doesn't show enough to be able to state  
13 those other locations.

14 Q Okay. Can you just tell us where the other  
15 locations are?

16 A To the north of the former rail spur and west of  
17 Highway 27 in the highway ditch.

18 Q So further north of this picture?

19 A Yes.

20 Q And then -- and west of Highway 27?

21 A Yes.

22 Q What was -- what were the sample number  
23 designations for those points?

24 A SW-C8.

25 Q Which was which one?

JANA MURPHY - ADVERSE

1 A The one north of -- the one along the highway.

2 Q Okay. And were there other -- was there other  
3 samples north that we can't see on this picture?

4 A There were additional samples collected, but that  
5 was just a one-time collection and that data was  
6 provided to the Department.

7 Q Okay. So the samples you've indicated here are  
8 regular samples you're taking -- not the one time, but  
9 the one you've talked about, SW-C8, BFSW-C2 and SW-C5,  
10 those are all samples you took on a regular basis in  
11 2010 and 2011?

12 MR. VAN CAMP: Objection as to form. Vague as  
13 to regular basis.

14 THE COURT: Overruled.

15 THE WITNESS: It was dependent upon if water  
16 was available or not.

17 BY MR. CASSIDY:

18 Q Okay. But those were sampling points you returned  
19 to.

20 A In additionally to one east of the highway.

21 Q What was the name of that sampling point?

22 A SW-C3.

23 Q So we've said 2011 and 2010. How about 2009? Were  
24 you collecting samples at those locations in 2009?

25 A I was -- yes, I would check those locations to see  
JANA MURPHY - ADVERSE

1 if there was enough water to collect and collect if  
2 there was.

3 Q Okay. And how about 2008?

4 A Yes.

5 Q How about 2007?

6 A I believe there were -- one of either SW-C8 and  
7 SW-C3 or both were added during the fall of '97  
8 monitoring, but without looking at a document I can't  
9 say for sure.

10 Q And I think you just said '97, but did you mean  
11 2007?

12 A Yes.

13 Q Okay.

14 A Thank you.

15 Q For -- and then there's the other sample point that  
16 we touched on earlier with the letter in 2004 where you  
17 said as a result of that letter you put a sampling point  
18 above the biofilter. Do you remember that?

19 A Yes.

20 Q Okay. Do you remember how long you took -- how  
21 many years you took samples at that location?

22 A I don't remember.

23 Q Would it help refresh your memory if you looked at  
24 some of your logbooks?

25 A Yes.

JANA MURPHY - ADVERSE

1 Q Okay. What was the designation of that location?

2 A SW-C7.

3 Q All right. And in -- did -- for the points where  
4 you were taking those samples, did you try to return to  
5 the same place to sample?

6 A Yes.

7 Q Okay. And is there -- what was the reason for  
8 that?

9 A There were assorted reasons, primarily for  
10 continuity between comparing -- comparing data  
11 results.

12 Q So it was important to go back to the same spot to  
13 sample?

14 A Within, you know, a few feet, yes.

15 Q Why don't we look at some more recent logbooks. Do  
16 you have Number 8? While we're looking for that, let me  
17 show you a photograph. This is Exhibit 12. You see  
18 Exhibit 12 down here. Do you recognize what we see in  
19 this photograph?

20 A Yes.

21 Q What are we looking at?

22 A We're looking to the north from Copper Park Lane  
23 and we're standing over the location of the culvert that  
24 goes under Copper Park Lane.

25 Q So in terms of the sampling points that we just  
JANA MURPHY - ADVERSE

1 discussed, are there any on this that you can identify  
2 on this photograph, any areas where you would sample?

3 A Because I can see the farmer's culvert, I collected  
4 samples at SW-C5, which is a location you can't see, at  
5 the inlet of the farmer's culvert. So it's somewhere  
6 there, but lower. (Indicating)

7 Q Okay. So when you say *inlet* you mean on the --

8 A North side.

9 Q North side is where you collected your samples.  
10 And what we're looking at here in the middle of the  
11 photograph, the culvert in the middle of the photograph,  
12 is the farmer's culvert coming out on the south side.

13 A Right.

14 Q Okay. So that at least -- that's SW-C5 is -- you  
15 can't see it in this picture, but that's where you would  
16 take samples.

17 A Right.

18 Q I'll hand you another logbook.

19 THE COURT: What's the exhibit number on that  
20 one?

21 MR. CASSIDY: Sorry, Your Honor. It's Exhibit  
22 8.

23 THE COURT: Thank you.

24 BY MR. CASSIDY:

25 Q And again, do you see the *Write in the Rain* copy on  
JANA MURPHY - ADVERSE

1 the cover there and some dates at the top?

2 A Yes.

3 Q And is that your handwriting?

4 A Yes.

5 Q And if you could turn to page -- I'll go by the  
6 logbook page just because those are the small numbers up  
7 there and easy to see. Page 58. Are you there?

8 A Yes.

9 Q Okay. Now the date at the top of that entry, log  
10 entry is April 25th, 2008?

11 A Yes.

12 Q And you've entitled it *Surface Water Sampling*; is  
13 that right?

14 A Yes.

15 Q And is this your handwriting?

16 A Yes.

17 Q Okay. And if you go down to the bottom of that  
18 page, there's an SW-C1 (grab). What sample point are  
19 you talking about there?

20 A This is the -- this is south of Copper Park Lane.

21 Q Okay. How far south approximately?

22 A I would say it's within 50 feet -- 30 feet of the  
23 outlet of the culvert.

24 Q Okay. And you indicate -- you take some  
25 measurements there. What did you find to be the pH that

JANA MURPHY - ADVERSE

1 day?

2 A 6.25.

3 Q And what did you indicate about the flow at that  
4 location?

5 A High.

6 Q And by high flow, what do you mean?

7 A It's greater than what I would normally see. It  
8 isn't quantitated, it's just a qualitative description.

9 Q What were the different -- would you say high/low;  
10 high/medium low or how would you do it?

11 A Yeah. Low, medium, high, very low.

12 Q Okay. So would high be the highest? Would you  
13 ever do very high?

14 A It's all dependent upon what is happening.

15 Q Okay. So is it fair to say there's a lot of water  
16 flowing when you indicate high?

17 A On that, yes.

18 Q Okay. And if you turn to page 60 and we go to the  
19 bottom of that page, we're still on 4-25-08; correct?

20 A Yes.

21 Q And I've circled on the screen, but there's an  
22 indication of BFSW-C2. What is that sample location?

23 A That is the outlet of the biofilter.

24 Q Okay. So -- and did you take pH there that day,  
25 too?

JANA MURPHY - ADVERSE

1 A Yes.

2 Q And what was the reading?

3 A 6.89.

4 Q And what was the flow at the outlet of the  
5 biofilter?

6 A High.

7 Q Then below that you have crossed out something.  
8 Are those your initials? Were you making a correction?

9 A Yes.

10 Q And is that SW-C5, what is that location?

11 A That is at the inlet of the farmer's culvert.

12 Q Okay. So, and what did you note the pH to be  
13 there?

14 A 6.23.

15 Q And what did you note the flow to be there?

16 A High, with an additional comment of flowing around  
17 culvert.

18 Q So if I put back on the screen Exhibit 12 where we  
19 saw the farmer's culvert on 4-25-08, you noticed it, it  
20 was actually flowing around the farmer's culvert; is  
21 that correct?

22 A Not as you show there.

23 Q Okay. How did you indicate or what was going on in  
24 terms of this picture?

25 A The farmer's culvert -- actually what was going on  
JANA MURPHY - ADVERSE

1 was on this, on the lower elevation here. Kind of in  
2 that general area.

3 Q So was there water flowing through the culvert?

4 A Yes. I would say so, yes.

5 Q And there was enough water that it was also flowing  
6 around the culvert?

7 A Yes.

8 Q Okay. And then just back to your logbook, on page  
9 61, the next page, at the top, you took a sample at  
10 SW-C8. Do you see that?

11 A Yes.

12 Q And where is SW-C8 in relation to the biofilter?

13 A That in relation to the biofilter, it is northeast  
14 in the highway ditch on the west side of Highway 27.

15 Q So is that upstream?

16 A As far as gradient-speaking elevation, yes.

17 Q It's upstream in the watershed?

18 A Yes.

19 Q Okay. And there you have a pH reading of what?

20 A 6.07.

21 Q And what did you note about the flow there?

22 A "High; ditch full with flow evident."

23 Q Okay. Let's go to page 126. Now this is a  
24 different date?

25 A Yes.

JANA MURPHY - ADVERSE

1 Q Okay. So what -- we're basically a year later,  
2 April 25th, 2009?

3 A Yes.

4 Q And how often would you take samples at these  
5 locations per year?

6 A An attempt was made at all the locations twice a  
7 year.

8 Q Okay. What times of year?

9 A Generally in the spring and fall.

10 Q And so this would have been the spring sampling?

11 A Yes.

12 Q And is this your handwriting also?

13 A Yes.

14 Q And at -- you indicate this is *SW monitoring*. Does  
15 that stand for surface water?

16 A Yes.

17 Q And then there's a notation at about or squiggly  
18 line 2:30 p.m. flow observed in Stream C. Do you see  
19 that?

20 A Yes.

21 Q And what are you indicating there?

22 A One of the guidelines of when I sample is since  
23 it's easily accessible, I'll check at the south of  
24 Copper Park Lane to see if there's any flow and that's  
25 likely what I'm referring to.

JANA MURPHY - ADVERSE

1 Q Okay. So when you say Stream C there, you're  
2 pretty sure you're referring to south of Copper Park  
3 Lane?

4 A That's -- yeah, if I'm not collecting at another  
5 location that's noted, then yes, 'cuz that's where I  
6 will check to see, and if there's no flow, then I won't  
7 plan -- I don't sample that day.

8 Q If you go to the bottom of that page, you say *below*  
9 *CPL*. What does that mean?

10 A Below Copper Park Lane.

11 Q All right. And what do you indicate there for  
12 flow?

13 A Moderate flow.

14 Q And that would have been sample point SW-C1?

15 A Yes.

16 Q I don't think we've covered that one yet, but just  
17 so we know, what sample point was that? Was that  
18 downstream of Copper Park Lane?

19 A Yes.

20 Q And then the next page, 127, you have *above CPL*.  
21 Does that refer to Copper Park Lane?

22 A Yes.

23 Q And then you put *dash Stream C*?

24 A Yes.

25 Q And what do you indicate about the flow there?

JANA MURPHY - ADVERSE

1 A Says *mod flow* which stands for moderate.

2 Q So the flow there was the same as it was below  
3 Copper Park Lane?

4 A That's what the notes say.

5 Q And you took these notes while you were observing  
6 this; right?

7 A Yes.

8 Q All right. And then SW, you make a notation SW-C5.  
9 That is the sample point above the stub road culvert;  
10 correct?

11 A Right.

12 Q So that's where you're taking that sample and  
13 that's where you're observing the flow.

14 A Yes.

15 Q And then if you go a little further down that page,  
16 I've put a circle around it on the screen, but you have  
17 a sample for the biofilter outlet?

18 A Yes.

19 Q And what do you indicate your observation is for  
20 that sample point?

21 A I'm sorry, could you repeat that?

22 Q I said what do you indicate your observation was  
23 for that sample point?

24 A It says, "low flow across outlet in Stream C; note  
25 that tree cut upstream and fell across channel."

JANA MURPHY - ADVERSE

1 Q So I just want to take those one at a time. When  
2 you say *low flow across outlet in Stream C*, what are you  
3 observing?

4 A I don't know exactly where I'm observing because of  
5 the length of the biofilter outlet.

6 Q What are you observing?

7 A I would say I'm observing the area that flows into  
8 the adjacent wetland.

9 Q And here you call that Stream C?

10 A Well again, that's the Stream C watershed.

11 Q Okay. The second part of your note says "Note that  
12 tree cut upstream and fell across channel." So what are  
13 you noting in your observation there?

14 A What I'm noting is that upgradient, that someone  
15 had cut a tree and the water that I saw there -- that  
16 the tree was across the water.

17 Q Across the channel.

18 A I don't know for sure if it was a channel. I  
19 didn't walked through it to check to see if -- if it met  
20 the definition of a channel, whatever that definition  
21 may be.

22 Q I don't know what the definition is. I'm just  
23 wondering what you saw and I'm going off your notes and  
24 you say it fell across the channel. Did you see --

25 A That's what it says here.

JANA MURPHY - ADVERSE

1 Q -- a tree fell across the channel?

2 A That's what I wrote.

3 Q And that's upstream of the biofilter.

4 A Yes.

5 Q And --

6 MR. CASSIDY: Your Honor, this may be a good  
7 point to break.

8 THE COURT: It is. We'll resume at 12:45 --  
9 no, 1:45.

10 MR. CASSIDY: Thank you, Your Honor.

11 (Recess at 12:15 p.m.)

12

13 \* \* \* \* \*

14 I, LYNETTE SWENSON, Certified Realtime and Merit  
15 Reporter in and for the State of Wisconsin, certify that  
16 the foregoing is a true and accurate record of the  
17 proceedings held on the 22nd day of May 2012 before the  
18 Honorable Barbara B. Crabb, District Judge, for the  
19 Western District of Wisconsin, in my presence and  
20 reduced to writing in accordance with my stenographic  
21 notes made at said time and place.  
22 Dated this 8th day of September 2011.

19

20 /s/\_\_\_\_\_

21 Lynette Swenson, CRR, RMR, CBC  
22 Federal Court Reporter

22

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